HISTORICAL TRIALS

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HISTORICAL TRIALS

By the late SIR JOHN MACDONELL, K.C.B.

Sometime King's Remembrancer and Senior Master of the Supreme Court of Judicature

Edited by R. W. LEE, D.C.L., with a Preface by THE RIGHT HON. LORD SHAW OF DUNFERMLINE LL.D.

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DEDICATED TO THE MEMORY

OF

AGNES, LADY MACDONELL

PREFACE

A WEEK or two after Sir John Macdonell's lamented death Lady Macdonell informed me of a project to publish some of his papers and asked me to write a prefatory note for the volume. She indicated to me that she knew that I was the friend whom her husband would have selected for this duty. I could not but comply with this request which has been repeated since Lady Macdonell's death with the same kind of honouring statement.

I valued greatly and benefited much by Sir John's friendship. From 'new and old' he dealt me out his treasures, and I was over and over again impressed not only by the fullness but by the suggestiveness of his mind.

The word jurist is in these days apt to be lowered by loose and common use, but in Sir John Macdonell's case the title was earned in all its distinction. I place him in the first rank of the jurists of his time.

He was born in 1845 at Brechin in Forfarshire, Scotland. At seven years of age the father's home was shifted to Rhynie in Aberdeenshire. John was the second son and they were a clever and scholarly family, the elder brother James becoming a well-known journalist.

The education was of the sort usual in Aberdeenshire, where for two generations at least two Bequests, known as the Smith and Milne Bequests, have stimulated the teaching profession in the ordinary schools. The Macdonells owed much to the Rev. George Stewart, one of those teachers. Looking back upon it one can see that such teaching, falling upon the son of a Highland Roman Catholic, Macdonell of Glengarry, and a Protestant

mother, Allardyce of Dyce, had the best of chances. In walking with Sir John I have been often struck with his physical powers—and with what I would call his toughness—in body as well as in mind. As to both I give credit to race, and to an environment in his youth which included the climbing as a boy over the slopes of Benachie.

He went to Aberdeen University, achieving first-class classical honours there. Then we find him on the staff of *The Scotsman* newspaper in Edinburgh, but, early bringing forth under his own independent pen several books—*A Survey of Political Economy*, *The Land Question, with particular reference to England and Scotland*, and, after he had gravitated into Law in the Middle Temple, *The Law of Master and Servant*. He did well at the English Bar. Without knowing it personally I can import into his work those qualities of thoroughness and accuracy which stamped all he did in later life. He became a Master of the Supreme Court, King's Remembrancer, the responsible editor of the *Judicial Statistics*, a Knight, a K.C.B. He knew more Civil Law than probably any number of his contemporaries, but the University of Aberdeen alone honoured itself by recognizing him as Doctor of Laws. This was in 1892, and in 1901 he was appointed Quain Professor of Comparative Law at University College, London; and he was for years Dean of the Faculty of Law there.

His public work and value were acknowledged by the very powerful Committee of distinguished Judges, &c., who were responsible for the issue of the *Reports of State Trials*, that new series 1888 to 1891, which contains certain interesting proceedings as to Queen Caroline, Daniel O'Connell, and William Cobbett. Macdonell became their Secretary and Editor.

In these later years he was in the forefront of persons of authority with regard not only to judicial statistics and proposed judicial changes and reforms. He seemed to be set to everything where his faculty for accurate inquiry and compilation could be utilized. He was sent to take evidence in South Africa in connexion with the Royal Commission on Shipping Rings (1906–9). He was Chairman of that important Committee which involved extraordinary research and industry, the Committee of Inquiry into the responsibility of Germany for Crimes by its Armed Forces on Land and Sea and in the Air. The Report was framed. Shall it ever see the light? Perhaps not. And this may be well; although history in a later age may grow restless over this oblivion.

In notices regarding Sir John I think too little has been made of his linguistic accomplishments. He appeared to use Latin, French, German, and Italian not only with facility but with a very acute power of gathering from those sources matter relevant to any broad juridical survey. He loved forming Societies which had a turn of this kind. He was one of the founders of the Grotius Society, which still lives, and of the Society of Comparative Law, whose journal is probably the most widely useful of any legal journal in the Empire. This great list may be concluded by a reference to his editing with Mr. E. Manson *The Great Jurists of the World*.

In the course of a busy official life he was able to compile the papers which are found in this volume. A perusal of them is sufficient to show not only those qualities of research and accuracy to which I have referred, but the breadth and penetration with which his survey of great historical events was conducted. It is not for me to presume to review this book, but from the paper on the

Trial of Socrates onward one gets glimpses of that panoramic survey by which he is able to illustrate the administration of justice so-called in one state and epoch with that administration in another. One learns from his pages to have a new respect for those who see in the evolution of such administration vivid tests of the advance of culture and the progress of civilization itself.

Having shown—as he has to show in the majority, one would almost say, of the instances which the volume presents—that the Trial of Socrates was no trial at all, but simply an impeachment of unsettling views, he exclaims: 'Had Socrates been tried in this country at any time before the middle of last century, would his treatment have been much better? In Tudor or Stuart reigns he would have been charged for high treason or blasphemy or misdemeanour of some kind, browbeaten by the law officers prosecuting, and scolded by the presiding Judge as a pestilent nuisance in the State, and his last words before a cruel death might have been cut short or drowned in the roll of drums beneath the scaffold. Let us picture his coming before an English or a Scotch Judge at the end of the eighteenth or the beginning of the nineteenth century—before an Ellenborough who tried Hone, or a Braxfield who tried Muir and Margarot; he would have been belaboured with pompous platitudes or subjected to coarse ribaldry, and his conviction would have been certain.'

This book may be said to be a recondite and powerful answer to the conundrum, 'When is a Trial not a Trial?' 'The Trial of the Knights Templars' is a record from many countries of proceedings which in every case were inspired by cupidity against the wealth which the Order had accumulated, and when royal and papal authority

combined to turn the procedure of the Inquisition and its powers of torture and organized incrimination by interrogatory into the mockery of testimony according to all modern ideas.

This upsetting of true judicial process, or rather the substitution therefor of organized political hatred under a semblance of judicial forms, this is the broad fact which these pages bring forth,—fact upon fact, to the complete satisfaction of every fair mind. The views, for example, of De Quincey in the last generation and of George Bernard Shaw in this generation on the subject of Jeanne d'Arc could not be more convincingly confirmed. But it is well to have here before us the record of her Re-Trial, practically by the same authorities, and to note how in cooler blood and more accessible to shame they expunged the first trial from the Records of Justice.

Another instance where, alas! no official Re-Trial has helped historical matter. As to Mary Queen of Scots, the paper in this volume (I have personally gone over a good deal of this ground) does, I think, justly bring to shame the prejudices of both Kingsley and of Froude; and I agree with every word of Macdonell's conclusion: —'Her defence and whole demeanour were queenly, though Mr. Froude may sneer at it as acting. It is too the spectacle of a great intellect combating a host of astute politicians and lawyers eager to condemn and make away with her. . . . Let us sum up the chief facts in the proceedings: a commission issued which virtually assumes her guilt; proposals to poison her; these not carried out; the substitution of the semblance of a trial before a court composed in the main of officers of State; no witnesses called against her; no precise charge formulated; refusal to assign her an advocate; refusal to let her have access

to her papers ; letters put in evidence against her, but no evidence given of their authenticity ; no proof of their actual delivery to her ; confessions or admissions used without the production of the persons who made them, as she demanded ; disregard of the provision of the 27th Elizabeth as to two witnesses. What is to be said of it ? Mr. Hosack speaks of it as the " most disgraceful of all the judicial iniquities which disgrace the history of England ".' Upon this Sir John Macdonell, the patient and most judicial investigator, quietly observes :—' I am inclined to think he is right.' So am I.

The limits of a preface have been far exceeded, but I desire in conclusion to call the attention of the reader specially to the so-called Trials of Bruno and of Galileo. He will thus get in clear illustration those defects of trials which divorce them from being instruments of pure justice. That is the secret. It has become unfashionable in Courts of Law to speak of them as Courts of Justice. It is thought that this is making an appeal to something which may mislead the law. Well, Macdonell had seen law and justice in grips over many generations. He knew what party influence was, inflammatory of passion, distorting truth. But he was no party man, and his exposures of the errors and crimes of ecclesiastical methods are as calm and cogent with Calvin, as he hounded down Servetus, as with the papacy, when it drowned the light in the days of Galileo. Crying out in revolt against prepossessions and prejudices which were the real grounds of trial and gave justice no chance, he makes a noble citation from the Laws of Manu worthy to rank with Isaiah's repeated appeals for righteousness.

His best service, in my opinion, in this book is to show how the perversion of trial and of justice have been

unhappily in the past caused by fear. 'Fear', says he, 'brings back the primitive conception of the functions of courts; not necessarily, or indeed often, personal fear, but fear of changes; fear on the part of the upholders of the old order; fear of the effects of the discoveries of new truths; fear of emerging into the full light. Where such fear is justice cannot be; a court becomes an instrument of power; judges are soldiers putting down rebellion; a so-called trial is a punitive expedition or a ceremonial execution—its victim a Bruno, a Galileo, or a Dreyfus.'

SHAW OF DUNFERMLINE.

EDITORIAL NOTE

THE subject-matter of this volume consists of lectures given by the late Sir John Macdonell, as Quain Professor, at University College, London, in the years 1911–13. Many proposals for publication were made at the time and afterwards. But pressure of other work led to postponement of the task of authorship. Then came the war followed by the heavy burden of a Royal Commission. Considerations, not at all of a self-regarding nature, delayed Sir John's retirement from his official functions longer than he desired. Only a few months and those passed in failing health intervened before his death on 17 March 1921.

When Sir John's papers came to be looked through, these lectures, more than any other part of the accumulated material, seemed fit for publication. They appeared to be very characteristic of the author's modes of thought and calculated to appeal to a wide circle of readers. The work of revision was entrusted, in the first instance, to Mr. F. H. Lawson, M.A., Fellow of Merton College, who was admirably suited for the task. Circumstances have prevented him from being associated with the editor in the later stages of reading and correcting the proofs. For this reason it would scarcely be fair to attach to him, except to the extent indicated, the responsibility of joint-editorship. But the editor wishes to record the great assistance which he has derived from Mr. Lawson's wide range of historical and legal knowledge.

The fact that a considerable number of years has elapsed since these lectures were delivered no doubt presents a difficulty. The editor has asked himself

whether he should furnish a bibliography of what has been written since on the various trials comprised in the series. But, upon consideration, this course has not been adopted. Sir John Macdonell was concerned not so much with the precise and detailed investigations which interest the historian. His object was rather to make a contribution to the history of legal procedure, as a chapter in the history of thought and of civilization. It is believed that thus regarded the studies of historical trials contained in this book will be found to have an abiding value and significance.

It only remains for the editor to thank Lord Shaw of Dunfermline for most kindly writing a Preface to this volume.

ERRATA

Page 17, l. 13, *for* Howe *read* Hone
„ 17, l. 14, *for* Palmer *read* Margarot

CONTENTS

I. SOCRATES

SOME time ago I lectured upon the most important systems of legal procedure. In continuation of that course I propose to select as typical certain trials which have attained world-wide fame, and which are fairly representative of the systems to which they belong. There does not exist, so far as I know, any adequate history of legal procedure; any systematic account of all the ways in which men have now or in the past sought to settle finally questions of right and wrong, questions as to property, questions of guilt and innocence. There are indeed many elaborate and admirable treatises upon legal procedure in different countries. But few writers have attempted to group the common facts and to give a comparative view of the whole subject. I can think of no attempt of the kind except certain chapters by M. Fustel de Coulanges. The materials are scattered far apart; but they exist in abundance, and some day they will be formed into an edifice. I am convinced that the subject lends itself to scientific treatment. Whether it be ordeal in an African village or in medieval times, trial by battle as it once existed over a great part of Europe, the rough and ready justice of a mining camp, or the elaborate procedure of an ecclesiastical court, the various modes fall into a few groups. Some of these I described and attempted to classify in previous lectures. It may be an aid to any one undertaking such a task as I indicate to describe with some minuteness certain trials illustrative of the chief systems of procedure.

Let me state clearly what I intend to do, and what I shall not attempt.

A trial is in its substance a struggle, a battle in a closed arena. It is a shock of contending forces, a contest which may arouse the fiercest passions. The issues involved in the trial, say of Socrates, of Jeanne d'Arc, of Bruno, or Calas, or Dreyfus, are among the deepest and greatest known to humanity. I would not, even if I could, deal with them. They are above my task. They are for the philosopher, the historian, the moralist. I approach these trials solely as a lawyer; examining the documents as a lawyer; trying to find answers to questions which a lawyer must put; necessarily passing over many of the greatest aspects of such trials, but also perhaps adverting to some apt to be ignored. I want to look at these cases just as if they were about to come into Court, or had just been decided; to view them as legal phenomena, part of the legal history of men, not the least part of the long story of the evolution of the human conscience. Accordingly I shall advert particularly to such points as these—the nature of the Court before which the trial took place, the exact charge against the accused, the procedure, the evidence, the interlocutory proceedings, the sentence and punishment.

For the close examination of trials I claim some advantages. Often a trial is the one luminous point in darkness, the one opening in an otherwise blank wall between us and the past. It takes one outside the formulae of the text-books. Faithfully reported, a trial is a living picture; it brings us nearer to life than the best literature; you hear the voices; it is life itself. Certainly for studying and understanding an ancient or foreign legal system nothing is more instructive than acquaintance with an

actual trial. You may read in Gaius, Beaumanoir or Bracton, texts descriptive of procedure, and many points will remain in obscurity, which the records of a single trial illuminate.

I must own that one obstacle to such a study stands in the way. No entirely complete report of any ancient trial exists. I mean complete in the sense in which are our legal reports; no verbatim record of all the evidence, together with the interlocutory remarks of judges or jurymen. Rarely are all the speeches given in full; generally only one is preserved; it is much if we have a meagre account of the course of proceedings and the result. All that we know may be derived from an advocate speaking as such or from a rhetorician or an historian who was not a lawyer. Conceive the task of unravelling the merits and issues in the trial of Warren Hastings solely from Burke's heated rhetoric. Imagine the ideas of posterity as to the Parnell Commission, if the only record were Sir Charles Russell's speech, supplemented by an account to be found in a partisan history. There is rarely any clear statement of the points of law raised and decided. There is nothing corresponding to our wonderful series of Year Books, or to our Reports of the State Trials, or to the verbatim reports which for some two centuries we have had of all the chief trials. As to the medieval trials, matters are still worse; men were tried, so to speak, in the dark and without publicity, and the only record may be a few formal documents.

I take as my subject certain great historical trials. Now, no two persons will agree as to what are the great trials of history. Every one would draw up his own list according to his country and the bent of his interests. But all lists would indeed contain certain trials, such as that of

Socrates. Probably all would include that of Jeanne d'Arc. I begin with the former. I totally disclaim, let me say at once, the idea of discussing this trial in all its aspects, or even in its chief aspects. That is far beyond my scope. That has been done many times. Each generation has given its judgements upon an event which the lapse of more than two thousand years has not made less memorable. For our generation Grote, Zeller, Gomperz, and Harnack have spoken. Each generation has formed a conception of its own as to the true Socrates. There are indeed many presentations of Socrates, and to-day scholars are busy in their efforts to exhume the real Socrates, and to distinguish the actual figure from that portrayed by Plato and Xenophon. With all that I am not concerned. I regard the trial solely from a legal point of view, examining it as a landmark in the history of procedure and as a typical example of an important system. The date was 399 B. C. when Socrates was seventy years of age or thereabouts, after he had filled several offices in his city, and some twenty-five years had passed since he was ridiculed and satirized in *The Clouds*.

What were the circumstances and the characteristics of the time? It was a time of unrest, uncertainty, instability, and rapid changes. The oligarchy, or tyranny, which followed the war was at an end and democracy had lately been restored (403 B. C.). Athens had 'passed in the course of a few months through every stage of a ruthless terrorism.'[1] It had been liberated from a vile despotism. Within a few years four great changes in the constitution had taken place. It was a time of exiles and enforced emigrations, and, as we should describe them, State prosecutions; emigrations which recall those in the Stuart times

[1] E. Curtius, *The History of Greece* (translated by A. W. Ward), iv. 69.

with us, or of the French *émigrés* in the eighteenth century.[1] It was a time of reverses, of falling power, military, naval, and economic; there was the memory at once of vanished supremacy and of recent disasters. It was a time of the entrance of new beliefs and ideas; and, as incident to such a juncture, there was a feverish desire to preserve the old Hellenic life, the traditions of the past, the belief in the gods of men's fathers and the old rules of life; a time of sensitiveness and suspicion.[2]

It is not unimportant to note, though I have not seen the circumstance adverted to, that the trial of Socrates for impiety took place about the same time as that of the orator Andocides upon a somewhat similar charge. It was, too, a period in which there were efforts to establish and preserve peace and order. An amnesty had been granted for all offences committed before the archonship of Euclides, a measure of moderation rare, if not unparalleled.[3] Measures had been taken to revise and codify the laws and to prevent the hasty passing of special laws against individuals. There were efforts to create, in modern phrase, a Rechtsstaat.[4] All historians have attempted to depict the peculiarities of that time of unrest and tension and reaction, none more luminously than Curtius.

Such were the circumstances in which the charge was brought against Socrates. Now what was the course of procedure and how far did it resemble an English trial?

[1] Hermann Köchly, *Akademische Vorträge und Reden*, i. 328. It is noteworthy that it is the year in which Plato withdrew to Megara, whither Lysias had fled in 404 B. C.

[2] Curtius, *op. cit.*, iv. 70.

[3] Köchly, i. 346.

[4] Adolf Menzel, *Untersuchungen zum Sokrates-Processe*, *Sitzungsberichte der Philosophisch-Historischen Classe der K. Akademie der Wissenschaften*, CXLV (Wien, 1903), ii. p. 32.

And first, what was the tribunal? It must be understood that there was no class of professional, permanent judges. Ancient democracy did not know such. Nor did ancient aristocracy; the Roman law was evolved and perfected without a permanent judicial body. At Athens it was conceived that every citizen of mature years was fit to be judge. Every year 6,000 of the age of 30 and upwards were chosen by lot. These 6,000 were the judiciary. They sat in ten sections or classes or committees, the number of which varied from 200 to 2,000; in this case it was probably 501. There was also no sharp separation —it is essential for the understanding of ancient trials to realize this—between the judicial and the legislative assembly; such precise division of powers as we know is a modern conception. Theoretically the ecclesia was larger; any citizen above 20 might there speak and vote. But in fact the attendance at the legislative assembly was generally less than the actual size of the judicial assembly. The Court was nearly the size of our House of Commons; and you are to think not so much of our Courts, but rather of a public meeting or of the House of Commons—a paid House of Commons—as the tribunal. The magistrate who presided had little power; apparently he could not vote. At every turn you find traces of trials being before a popular assembly rather than a Court; in fact, before a crowd rather than a jury; a crowd with its well-known weaknesses, liable to sudden gusts or contagions of feeling; excitable, fickle,[1] and, let me add, a large crowd in a very small community with all the necessary consequences—strong influence of local and temporary feeling; knowledge by the judges of the parties, and

[1] Georges Perrot, *Essais sur le droit public et privé de la république Athénienne—Le droit public*, p. 231.

often, probably, preconceived opinions as to the facts, and the certainty that the judges had heard much local gossip; no possibility of a change of venue and practically no appeal—absence of some of the conditions essential, we should say, to a fair trial. It was hardly possible to exclude politics when every judge or juror was a member of parliament. Justice had at one time been administered aristocratically, the Archon decided disputes. But the judicial power had passed entirely to the body of the people. Jefferson's idea of a popular judiciary had been realized. The Athenian people had taken the step which the extreme representatives of modern democracy have sometimes threatened to take, and which, for aught you or I know, may be one of its future developments; to quote a French writer: 'La justice faisait partie intégrante de l'organisation politique, le peuple devenu souverain va s'appuyer sur le tribunal de l'Héliée.' [1] We shall not see things aright nor shall we be fair to what was done in 399 B. C. if we do not think of the trial as resembling an impeachment before a legislative body rather than proceedings before an English jury.

Each of the jurymen received his two tablets of bronze with one of which he was to record his vote of condemnation or acquittal. Each of them took an oath, probably two oaths. Modern scholars are not agreed as to the exact form. But probably it ran somewhat thus: 'I shall vote in conformity with the laws and with the decrees, those of the people of Athens and the Senate of 500; in cases which the legislature has not foreseen I will do what is just, not guided by fear or authority; I shall vote only on the questions submitted to the Court; I shall listen

[1] Henry Bourgeois, *Le Tribunal des Héliastes et le Procès de Socrate*, (Nimes, 1891), p. 8.

with attention to accuser and accused, the plaintiff and the defendant; I swear it by Zeus, by Apollo, by Demeter. If I am true to my oath, may my life be long. If I perjure myself, a curse be on me and my family'—an oath as solemn as that gabbled off in our Courts of Law, and one which was a precise monition of the perils to which a popular tribunal is specially exposed.

Who were the prosecutors? In Athens there existed a system of private prosecution. Any one might come forward and bring a charge against any one, as he may do here. There was, however, a deterrent to this course; the private prosecutor was liable, if he did not get a fifth of the votes, to pay a heavy fine [1]—quite as good a check upon ill-judged criminal proceedings as the possibility of bringing an action for malicious prosecution against, it may be, a pauper, a bankrupt, or a man of straw. Usually there was more than one prosecutor, or there might be an assistant prosecutor.[2] Perhaps this was to prevent collusion, to ensure a fair trial, or to give added weight to the proceedings. Perhaps it was a reminiscence of the procedure of the legislative assembly, which that of the Courts resembled. In this instance the prosecutors were three: Meletus, Anytus, Lycon. The case no doubt began with a sworn information before the Archon Basileus, who had jurisdiction over cases of this sort; of its exact nature in this particular instance we know nothing. But if the ordinary course was pursued there was a preliminary inquiry (*ἀνάκρισις*), at which sworn statements in writing were made, documents, and all the exhibits, as we should say, put in a metal or earthen jar

[1] 1,000 drachmae, or about £40. See Demosthenes *contra Timocratem*, p. 702.

[2] Meier und Schömann, *Der attische Process*, p. 708.

and sealed, to be produced in Court. Next came the indictment (γραφή), or document corresponding thereto. It was as follows: 'Meletus, the son of Meletus the Pithian, deposed on oath the following information: Socrates does evil. He does not believe in the gods whom the city believes in, but introduces other new deities. He corrupts the youth. Punishment—death.' I am not forgetting that there is some uncertainty as to whether this was the indictment or the sworn complaint before the Archon.[1]

Now, to an English lawyer—I might say to every modern lawyer—the brevity and vagueness of the charge seem incomprehensible. According to English Criminal Law it would have been bad from its want of particularity as to time, place, nature of offence and circumstances. Any properly drawn indictment would specify them. In a Scotch indictment in the old form, the minor proposition of the syllogism would have described these particulars; so too, the modern form under the Act of 1887. The French *acte d'accusation* would have been a veritable biography of the accused. The German *Anklageschrift* would have precisely defined the charges to be met. Good enough for a motion in a popular assembly, the indictment of Socrates must seem to any lawyer inconsistent with the essentials of a fair trial in a Court of Justice.

At the actual trial the course of procedure was this: first, the prosecutors spoke; in this case, all three, each probably taking a different line. Then came the witnesses. Who they were and what precisely they said is unknown. We may conjecture what was the line of attack of the prosecution; it is probably to be inferred

[1] Ibid., p. 608.

from the reply, assuming that Plato's *Apology* records accurately the real speech of the accused. I need scarcely remind you of the character of the defence. It is manly and uncompromising. I cannot say that it seems to be all strictly relevant to the charge; a judge of our Courts would probably in his summing-up have pointed out that the defendant was labouring points not before the jury or open for their consideration. Socrates seeks first to remove the weight of prejudice against him, the attacks of his old enemies, going back to the time of *The Clouds*. He examines the origin of this prejudice. He finds it in this:

'I go about the world obedient to the god, and search and make enquiry into the wisdom of any one, whether citizen or stranger, who appears to be wise; and if he is not wise, then in vindication of the oracle I show him that he is not wise; and my occupation quite absorbs me, and I have no time to give either to any public matter of interest or to any concern of my own, but I am in utter poverty by reason of my devotion to the god.'[1]

Dealing with the charge brought against him by his accusers in Court, Socrates presses Meletus by searching cross-examination, until he gets from him the answer that he thinks that Socrates did not believe in any gods, and proceeds to entangle him in a dilemma. Then, in solemn strain, rising above the incident of the hour, and indifferent to his own personal fate, he speaks as judge rather than as accused. He will not buy safety by silence, or by forsaking his divine mission.

'If you say to me, "Socrates, this time we will not mind Anytus, and you shall be let off, but upon one condition, that you are not to enquire and speculate in this way any more, and that if you are caught doing so again, you shall die";—if this was the condition on which you let me go, I should reply: "Men of Athens,

[1] *Apology*, p. 23, Jowett's translation (3rd ed.).

I honour and love you; but I shall obey God rather than you, and while I have life and strength I shall never cease from the practice and teaching of philosophy."'[1]

... 'I am a sort of gadfly, given to the state by God; and the state is a great and noble steed who is tardy in his motions owing to his very size, and requires to be stirred into life. I am that gadfly, which God has attached to the state.'[2]

He had often refrained from action in obedience to a divine sign.

'I have had it from my childhood; it is a kind of voice which, when it speaks, always turns me back from whatever I am going to do and never urges me to act.'[3]

He will make no entreaty for mercy to his judges, who do not sit to make presents of justice but to judge. Finally, and as to the chief charge against him, his answer is:

'I do believe in the gods, as no one of my accusers believes in them; and to you and to God I commit my cause to be decided as is best for me and for you.'[4]

Such is the substance of the speech for the defence in the *Apology*.

Is that which Plato puts into his mouth a fairly accurate report of what was actually said? Upon that point—the subject of controversy for centuries—I should not of course venture to express an opinion, if scholars and historians were at one with regard to it. But they are still hopelessly divided, as they always have been. In that diversity of opinion I venture to express doubts whether we have the true speech. I conjecture that every lawyer, thinking of the tribunal to which it was addressed, the nature and circumstances of the charge, would say that it was too literary in form, too round and

[1] Ibid., p. 29.
[2] Ibid., pp. 30-1.
[3] Ibid., p. 31.
[4] Ibid. p. 35.

smooth, too devoid of the element of unexpected incidents which never fail to occur in an actual trial. Conceive what was the tribunal, what was the theme and who was the accused. The tribunal a large crowd, not presided over by any one with the powers of control of an English judge, with no doubt many bystanders and spectators; the question one of life and death of a well-known citizen; the theme one of supreme moment to every hearer. It is barely possible that a jury of over 500 persons should have kept silence all that day. 'Do not interrupt me', says the accused to his judges (cap. xviii). Were there interruptions, and, if so, what were they? With no judge to regulate effectively the proceedings, there must have been some of the interruptions and incidents which never fail to occur even in Courts where forms are rigidly observed, and can, if necessary, be enforced. Socrates must have known all, or almost all, the persons whom he was addressing. He could scarcely omit in answering some of the charges, especially as to the corrupting of youth, to speak straight and directly to certain of his hearers.

There are discrepancies between Plato's and Xenophon's account. The witnesses, who, in all probability, were called, though the speech is obscure as to this, are entirely ignored,[1] and we hear nothing of a witness whom the defendant promises to call. I cannot but suspect that the speech, together with the whole proceedings, was much less statuesque than the *Apology* represents it. Plato's version of it is great literature, none greater; supreme in its solemnity, dignity, and restrained pathos, in its simplicity and eloquence. It lacks only the element

[1] Pöhlmann, *Sokratische Studien, Sitzungsberichte der Kaiserliche Akademie der Wissenschaften zu München*, 1906, p. 88.

of reality. It is anything but the unstudied improvisation which it professes to be. It is not a speech to get a verdict.[1]

We know the result. In a Court of 501, 281 voted against the accused. It was a narrow majority; a change of 31 votes would have meant acquittal.

Next came the question of punishment, which it was the business of the prosecutors (as in some modern systems of criminal procedure) to propose. We may assume that one or more of the accusers spoke, as they were entitled, in support of the punishment of death. Of this, also, there is no record. Then came Socrates' reply (*ἀντιτίμησις*) in which, as of right, he proposed a counter penalty. It was uncompromising, ironical, and arrogant. If he gets his deserts, he will be maintained henceforth as a benefactor at the public expense. He will not be silent; he will continue his work, whatever be the result; the greatest good of man is daily to converse about virtue and all that concerning which he was in the habit of examining himself and others; 'the life that is not examined is not life at all.' Apparently to meet the wishes of his friends, he suggests a fine of 30 minae. This line of defence was disastrous; it not merely braved the judges, but put them in a difficulty, because by Athenian practice, if not law, the Court must select between the punishment proposed by the prosecution and by the defendant. According to Diogenes Laertius, it turned eighty of the judges against him.[2] In the *Apology* are recorded Socrates' last words to the Court. Again he speaks as judge of his judges, but addressing to them no

[1] [Did Socrates wish to get a verdict? John Burnet, *Plato's Euthyphro, Apology of Socrates and Crito*, Clarendon Press, 1924, pp. 64–5.]

[2] Riddell, *Apology of Plato*, Introduction, p. xi.

reproaches and resigned to his fate. His divine monitor has convinced him that what has happened must be a good,

'and those of us who think that death is an evil are in error. For the customary sign would surely have opposed me had I been going to evil and not to good.' [1]

He is hardly angry with his accusers or those who condemned him. His only request is that they will punish his sons if they care for riches more than for virtue, or reproach them, if they think they are something which they are not.

'And if you do this, both I and my sons will have received justice at your hands. The hour of departure has arrived, and we go our ways—I to die, and you to live. Which is better God only knows.' [2]

Thus ended the trial. Socrates was taken to prison, where he remained free to see and converse with his friends, as told in the *Phaedo*. He is pressed by them to make his escape, and strong reasons, not wholly personal, are urged for this. But he will not yield or take a course which would be doing all he can to destroy the State. To depart without its consent would be doing wrong.

'Neither may any one yield or retreat or leave his rank, but whether in battle or in a Court of law, or in any other place, he must do what his City and his Country order him; or he must change their view of what is just.' [3]

And so on the thirtieth day he drank the hemlock. 'Such was the end, Echecrates, of our friend; concerning whom I may truly say, that of all the men of his time whom I have known, he was the wisest and justest and best.[4]

[1] *Apology*, p. 40.
[2] Ibid., p. 42.
[3] *Crito*, p. 51, Jowett's translation.
[4] *Phaedo*, p. 118.

I come to the questions which twenty centuries have reiterated and which are still fresh. Was it a fair trial? Was Socrates guilty? Was the defence a long sophism? Did he corrupt the youth? Was the result a judicial error or a judicial murder? I do not believe that to these questions there ever will be one answer. There will always be those who prize order and the interests of the community above all else; who make the safety of the State the supreme law; and they will answer as did Hegel, as many others have done since: 'It was a good deed, a necessary deed; Socrates must die that the people might live and be strong.' That was the opinion of the majority of his fellow citizens; and there is no reason to believe that they repented, at all events until long afterwards. What they did was done in a time of uncertainty and with fears prevalent such as those which sent, more than 2,000 years later, Condorcet and Bailly and Lavoisier to the guillotine; and which made a Birmingham mob burn Dr. Priestley's house amid shouts of 'No philosophers! Church and State!' In the unstable circumstances of the Athenian State, with no outlet for popular passions except the ecclesia and the dikastery, there was some excuse for it. He was a menace to the old order; he struck at its very base. Any shock to the foundation of the State was immediately felt. It travelled unhindered from the base to the summit of the edifice. There were no intermediate elements to deaden the blow. 'The interests of the State lacked the protection afforded by the hereditary transmission of the supreme magistracy, by an organized military power and a system of public departments.'[1] If the motives of the prosecution were largely political, set on foot by

[1] Gomperz, *Greek Thinkers* (translated by G. G. Berry), ii. 113.

'a man of strong political convictions,'[1] so also was the line of defence addressed to his countrymen by one who was, Mr. Riddell says, 'totally out of harmony with their political optimism.'[2] If the prosecution and condemnation of Socrates were acts of State, they were at least done decently and in order, and with no desire to stifle the voice of the victim, and there are none of the circumstances of brutality which I shall often have to note in medieval and modern trials. That is one view of the trial still often expressed. But there will always be others who, prizing individual freedom and the inner life above all things, thinking much of the invisible and imponderable things about us, will regard the result as a crime, the victim as the first and greatest martyr for true freedom and true progress. In the presence of these antinomies among the irreconcilable things of life, the mere lawyer cannot give much assistance. But he will try to put himself in the position of the judges, and seek to understand the law which they administered; he will apply to their conduct the tests, not of our time, but of their own. And he will also put to himself the question: would the results have differed if Socrates had been tried elsewhere and at some other time? It will appear, I think, when I come to treat of subsequent trials, that he might have fared no better, perhaps worse. Brought before an ecclesiastical Court, as were Bruno and Campanella, he would have been tortured; he would have been subjected to repeated examinations and long confinement intended to break him down in body; his prosecutors laying hold of his belief in a demonic voice, he would have been charged with sorcery or magic; he would have been cut off from his disciples and delivered over,

[1] Riddell, p. xxviii. [2] Ibid., p. xxx.

shattered and crushed in body, to the civil power to be burned. Had he been tried in this country at any time before the middle of last century, would his treatment have been much better? In Tudor or Stuart reigns he would have been charged for high treason or blasphemy or misdemeanour of some kind, browbeaten by the law officers prosecuting, scolded by the presiding judge as a pestilent nuisance in the State, and his last words before a cruel death might have been cut short or drowned in the roll of drums beneath the scaffold. Let us picture his coming before an English or a Scotch judge at the end of the eighteenth or the beginning of the nineteenth century—before an Ellenborough who tried Howe or a Braxfield who tried Muir and Palmer; he would have been belaboured with pompous platitudes or subjected to coarse ribaldry, and his conviction would have been certain. An Austrian writer in 1855 says that if he had been in Vienna or Berlin or Munich, and had been constantly assailing the incompetency of rulers and the faults of the existing dynasties:

'it would not have been after ten years, but in the first year of his teaching that he would have been put *extra statum nocendi*; and even if he had not been condemned to death, he would have been imprisoned for life.'[1]

If we could conceive the great searcher of truth in the world to-day his fate would be different. He would be the terror of the ordinary party politician, of unscientific lawyers and writers subsisting by the facile handling of undefined concepts. They would hate and dread his 'heckling' and the consequent depreciation of their verbal stock-in-trade. But he would not drink hemlock. He would be explained—explained by those who did not

[1] Köchly, i. 358 n.

understand him—as impracticable and as an obstruction. He would not be persecuted; he might be belittled. He would not be silenced by the State. But in a world noisy with many voices over little things he might not be heard. It is not certain that many to-day would understand, as his hostile judges understood, that a great disruptive force had come into the world. Of course he would not have perished by process of law. But his teaching would not have had the seal of martyrdom, his example not the ever-memorable effect given to it by the crowning act. It is, as Harnack says, the dying Socrates, not the living teacher, the unwearied searcher after truth, the supreme dialectician, the master of the inductive method in its full range—that speaks to posterity.[1]

[1] Harnack, *Sokrates und die alte Kirche* (Giessen, 1901).

II. THE KNIGHTS TEMPLARS

I COME next to a trial which forms one of the enigmas of history; a trial, or to be more accurate, a series of trials, as to which there is no agreement; as to which opinion has fluctuated much; as to which scholars of eminence still differ profoundly; as to which materials of value are being from time to time discovered: I mean the trial of the Templars and their order. Only lately one document of great value has been found by Schottmüller, and at any time there may come to light fresh evidence which may affect the verdict upon the questions at issue. To refer to only a few of those who have studied the subject, I may mention that Michelet, in his *History of France*, was on the whole clear as to the innocence of the order; his view was that a great crime had been committed, and he gave his reasons for that opinion. It fell to him subsequently to edit the records of the French trials preserved in the National Library at Paris, and, in the preface to the second volume, he announced that he had modified his earlier opinion. Raynouard, one of the first of modern scholars to look clearly into the subject, was emphatic in his verdict of acquittal. So was M. Lavocat in *Les Procès des Frères et de l'Ordre du Temple* (1888). So too was Döllinger, who in his last lecture pronounced in favour of their innocence.[1] On the other hand, it must be owned that Ranke took, on the whole, a contrary view. Unfavourable, too, though on peculiar grounds, is the conclusion of Prutz, who has in several books minutely examined the subject; while not

[1] J. J. I. von Döllinger, *Akademische Vorträge*, iii. 245.

thinking that all the charges are proved, he is of opinion that they were substantially well founded. Of the very latest authors who have studied the subject (Dr. Lea, Dr. Finke, and Dr. Gmelin), I may say that all of them are in the main convinced of the innocence of the order as an order, whatever may have been the failings of individuals. In face of this variety of opinion I need scarcely say that I shall state my conclusions with great diffidence. But I have examined the original documents; I have come to their perusal with no preconceived opinion; and I have tried to look at the long-standing controversy chiefly from the point of view of a lawyer, applying the ordinary canons of evidence.

I have spoken of the trial of the Templars. In strictness it was not a trial. Rather it was a series of trials, the defendants to be counted by the hundreds, the venues not in one country but extending over the greater part of Europe—France, Brabant, Provence, several parts of Italy, England, Ireland, Scotland, Germany, Spain, Majorca, Portugal. Another peculiarity: it was not only the trial of so many individuals for crimes which it was alleged they had committed, but of a great religious international order; a trial therefore, so far as I know, absolutely unique.

It was an attack under the guise of law upon an international and privileged order; and, so far, a measure somewhat similar to the destruction of the monasteries, the overthrow of the Jesuits, or the abolition of the religious orders in our days in France. But it had special and indeed unique features. There were international trials; there was the spectacle never before or since witnessed of trials going on simultaneously in several countries; the same defendants, much the same prosecutors, the same

evidence, the same charges preferred, and with exceptions to be stated, the same results. Whatever be thought of the result, it was no doubt a great turning-point in history. Döllinger states this impressively: 'If I were to name one day in the whole extent of world-history which appears to me to be in very truth *dies nefastus*, I would name no other than the 13th October 1307.'[1] A strong statement, but one for the truth of which much may be urged.

Let us recall certain material facts and illuminating dates.[2] The order had small beginnings. After the capture of Jerusalem by the Crusaders in 1099, the pilgrims who flocked to Palestine suffered much at the hands of the Bedouins and robbers who infested the roads. To put an end to all this crime, pious knights formed a brotherhood for the protection of the highways.

'Quidam autem Deo amabiles et devoti milites charitate ferventes, mundo renuntiantes, et Christi se servitio mancipantes, in manu Patriarchae Hierosolymitani professione et voto solemni sese astrinxerunt, ut a praedictis latronibus et viris sanguinum defenderent peregrinos, et stratas publicas custodirent, more canonicorum regularium in obedientia et castitate et sine proprio militaturi summo regi.'[3]

Two knights were sent to St. Bernard, abbot of Clairvaux, to ask him to use his good offices with the Pope to obtain approbation of their order, and to arrange for statutes or rules reconcilable with the tumult of the camp and the profession of arms. St. Bernard used his influence with the Pope; a council was assembled at Troyes in 1128;

[1] J. J. I. von Döllinger, *Akademische Vorträge*, iii. 263.

[2] See G. Schnürer, *Die ursprüngliche Templerregel*.

[3] Jac. de Vitr., *Hist. Hierosol.* apud *Gesta Dei per Francos*, c. lxv, p. 1083, quoted by C. G. Addison, *History of the Knights Templars* (1842), 5 n.

approval was given; and to him was left the framing of rules. The rule of the order was austere and harsh. The knights were to have no possessions of their own except their arms and their habits. They were to wear white cloaks, but with no ornaments; their squires were to wear black garments; their food was to be simple, their demeanour sober; they were to talk little; they were to eschew hawking and even hunting. In a treatise or exhortation, which St. Bernard wrote at the request of the Grand Master Hugh de Payens, he described the perfect Christian warriors. They are to wage the war of Christ their master without fearing that they sin in killing their enemies, or of being lost if they are themselves killed, since when they give or receive the death blow, they are guilty of no crime, but all is to their glory. If they kill, it is to the profit of Christ; if they die it is to their own. The Christian is glorified by a pagan's death, because Christ is thereby glorified. Pagans are not indeed to be killed unnecessarily; but in the present circumstances it is more expedient to put them to death, in order that the rod of the sinner should not smite the just. St. Bernard becomes ecstatic in his exhortations to the soldiers of the Cross: 'Go forth, tranquil and content, repel with victory the enemies of the Cross of Christ, assured that neither life nor death can separate you from the love of God; happy and glorious those who return victorious, happier still those who die in battle.'[1]

Never was the slaughter of the heathen extolled in more lyrical, exultant terms.

I fear that if ever this lofty ideal was realized by many of the Templars, a great change had taken place by the

[1] St. Bernard, *De laude novae militiae ad milites templi*, in Migne, *P. L.*, clxxxii. 921.

end of the thirteenth century in their condition and their habits. In truth their original vocation was gone. From 1095 to 1291, a period of nearly two centuries, followed various Crusades. In 1291 they came to an end. The Crusaders had lamentably failed; the Crescent had triumphed over the Cross; by the capture of Acre in that year the last foothold of the Western nations was lost, and the Knights Templars' occupation was at an end. Meantime they who were, according to the rule of their order, to live in poverty with no possessions except their arms and horses had grown enormously rich. They had fiefs and manors scattered all over Europe. They were too bankers and money-changers on a large scale.

The tendency has been to exaggerate their numbers; Dr. Gmelin,[1] quoting the few available figures, calculates that at no time were the Knights more than 2,000; the members of the order added to these would come in all to about 15,000.[2]

The annual income of the order in Europe has been roughly estimated at six millions sterling,[3] which is probably a great exaggeration. Matthew Paris states that in Europe they possessed nine thousand manors besides large revenues proceeding from charitable bequests or donations.[4] That they were proud and haughty, that they were often grasping, that they used to the full their opportunity as bankers of making money is clear. Scholars have collected popular expressions of those times as to their pride and luxury, e. g. 'to drink like a Templar'; and we may refer to the speech of a Grand Master in which he bewails the declension of the order from its

[1] J. Gmelin, *Schuld oder Unschuld des Templerordens*, pp. 231–2.
[2] Ibid., p. 234. [3] Addison, p. 97.
[4] Matthaei Paris, *Historia Maior, etc.* (1640), p. 615.

original simplicity, and predicts evil days in store for men who are false to St. Bernard's rules.

They had obtained from successive Popes important privileges which they used to the full extent, and, as an international body, they had a policy of their own which they pursued without reference to the interests of their native lands. Their inclination would be to stand by the Papal power rather than the national sovereignty.[1] It is plain that they were regarded in several quarters with jealousy.[2] But no one seems to have supposed that they were a real danger to the State, even in France where they were most numerous; they were too scattered to admit of any decisive or continuous influence. The evidence of special or widespread hatred of the order before the fatal blow fell is slender. In 1304, Philip, who was in a few years to destroy them, had spoken of their *opera pietatis et misericordiae*. Probably they were not much better or worse than other men of their own rank and pursuits, men who had lived in camps and in many lands, who were subject practically to no law except that of their own order, who were accustomed to rule their dependents harshly and despotically. Suddenly, to the amazement of the men of the time, including those likely to be best informed, this powerful order, the child of St. Bernard, the favourite of the Church and of Princes and pious donors in all lands, was denounced as grossly heretical, its members guilty of systematic immorality on

[1] Gmelin, p. 225; e.g. Bull *Omne datum optimum*, 1172—18 June, 1163—26 October, 1173; Rymer, i. 27.

[2] H. G. Prutz, *Zur Genesis der Templer-prozesses*, in *Sitzungsberichte der Kaiserliche Akademie der Wissenschaften zu München* (1907), p. 5. At the Council of the Lateran (1179) they were admonished by reason of their abuse of the privileges which they had received from the Holy See.

a scale of depravity unknown before, the order itself an unholy institution; its members were thrown into prison and tortured, many burnt at the stake, and for five or six years, almost in every land in Europe, they were the subject of fierce persecution.

To see how the prosecution came about, and ended in the destruction of the order, we must understand the political and financial situation and circumstances of the time; in particular the position of the Crown in France, the Papacy, the Clergy, the Templars, and not least, the powers and functions of the Inquisition. In the first place the Crown was poor. It was put to desperate expedients to raise money; it had, for example, debased the coinage so often and to such an extent that Philip was popularly known as the counterfeiter (to Dante he is 'il mal di Francia').[1] He was indebted to the order and had no means of repayment. In the next place there had been going on between the Crown and the Papacy a struggle in which the French Crown had signally triumphed. Pope Boniface VIII had been baffled and outwitted and humiliated and had died in misery; and after a short interval he was succeeded by Clement V, a man of no strong character, vacillating and irresolute, not the less the creature or puppet of Philip because from time to time he revolted against Philip's ascendancy. He might strive to free himself from the domination of the King; all to no purpose, he must always in the end succumb. He might more than once have averted the catastrophe; his weakness and irresolution precipitated it. What the King greatly desired were bold, clever, astute men about him who could carry through, excommunications notwithstanding. For there

[1] *Purg.* vii. 109; cf. xx. 91.

had arisen a school of statesmen and lawyers, who began to play a great part in political life and organization. I mean the legists or publicists who, bred upon Roman law, acquainted with the organization of the Roman Empire, and accustomed to look up to it as perfect, exalted the power of the sovereign, and were ready to put themselves in antagonism to the Church. They had no liking for an order which stood outside, so to speak, the feudal system, which recognized no master except God; they detested this aristocratic republic.[1] We shall find their creed later, expressed more completely by men such as Bodin; but it is already formulated: 'ces chevaliers en droit, ces âmes de plomb et de fer, les Plaisians, les Nogarets, les Marignys, procèdent avec une horrible froideur dans leur imitation servile du droit romain et de la fiscalité impériale.'

Among these was a lawyer whose work and influence at this time have only recently been fully measured or appreciated. Pierre du Bois had one fixed idea, and that was to exalt the power of the Crown in France, a subject upon which he was a fanatic. He wrote copiously and not a little with reference to the Templars. He was the author of the *requête censée* purporting to be addressed by the people to the King requesting Clement to suppress the order. He is believed also to have written *Quaedam proposita papae a rege super facto Templariorum*; also a fuller *requête* of the people to the King praying for the abolition of the order. In this last tractate he argues that the King has jurisdiction over them. The Templars being apostates rather than heretics are to be regarded as homicides belonging to the King, an argument likely to satisfy those who were already fully convinced. A man

[1] Lavocat, *Procès des frères et de l'Ordre du Temple*, p. 103.

of great ability and courage, Du Bois did much to make familiar the idea of abolition of the order and confiscation of its property. Then too the bishops and clergy had grievances against the order.

Let me add that it was a time of disillusionment and disappointment. The Crusaders had failed, signally failed, to the knowledge and amazement of every one. That was not all. Men of the West had met men of the East; they had fought against each other; they had learned to respect each other; they could not return home with the prejudices unshaken with which they had set out. The Crusades had doubtless brought about a confusion of beliefs, a mood of lassitude, perplexity, and scepticism in many minds, the natural sequel to the enthusiasm out of which they arose. It had become evident that men might gain the Holy Land and lose or impair their faith. Thrown together with Saracens, living in the East as their home, the Crusaders no doubt caught something of the manners of the East; they were rich and often idle; they had become acquainted with practices repugnant to Western people. It was, too, a time in which there was much talk of heresy and in some quarters a veritable rage for persecution. And what is also clear—what for the first time has been demonstrated by Dr. Lea—is the importance, as a factor in the case, of the Inquisition, which had become a compact and powerful organization. The prosecution which I am about to describe was its first great triumph, and without its aid the proceedings might have failed. The Inquisition lent its machinery and threw over the worst atrocities the veil of legality. It struck for the first time at the mightiest.

'The entire French kingdom was at that time a realm of the Inquisition. . . . Philip the Fair had in a way set himself up, like

no other monarch before or since, not even Philip II of Spain, as the favourer and protector of the Inquisitors and the Dominican Order.'[1]

As Dr. Finke says:

'Thus the Inquisition and the Monarchy appear bound together as at no other period of the Middle Age. We have indeed often to recognize a dependence of the temporal power on the Inquisition, but in France we find the converse relation, and with it what is in many ways a caricature of the working of the Inquisition. Unless we realize that the Inquisition is the basis of the Templars' trials, we cannot understand the prosecution in its entirety.'[2]

I do not know whether it could be shown that the Inquisition had captured the Monarchy, or the Monarchy the Inquisition. In this alliance each found the other useful.

And now a brief narrative of the course of events in the prosecution, which fall into two groups; proceedings against the individual members, proceedings against the order itself; proceedings intended to bring guilt home to individuals, proceedings intended to fasten upon the order itself the charge of heresy, which if proved entailed confiscation of its property. The Pope in 1306, shortly after his coronation, had invited the Grand Master of the Temple and the Knights Hospitallers to come to France to consult about the means of recovering the Holy Land; whether this was a project of deception I do not know. The latter did not come. The Grand Master of the Templars, Jacques Du Molay, accepted the invitation and arrived in the beginning of 1307. There were some negotiations which came to nothing about a union of the two orders. He was received with honour as befitted his

[1] Döllinger, iii. 252.

[2] H. Finke, *Papsttum und Untergang des Templerordens*, i. 149.

rank. There was nothing to excite his suspicion. The King struck suddenly and without warning; on the 14th September 1307 he sent to the baillis and sénéchaux of the provinces of France secret orders in which, enlarging upon the enormous wickednesses of the Templars, he directs them on the 13th of October next to surprise them, make them prisoners, and seize their property. Torture was to be used, if necessary, and a promise of pardon was to be given if they confessed the truth, 'but if not, you are to acquaint them that they will be condemned to death.'[1] Accordingly, on the night of the 13th October 1307, orders went out for the arrest and imprisonment of all Templars in France. The day before the Grand Master Du Molay had been invited to attend the funeral of the Princess Catharine. On the following day throughout France the Templars, with few exceptions, were made prisoners. The chief seat of the order in Paris, where was its treasure, was taken possession of by the King's Ministers. The masters of the University were invited by the King to express their opinion upon the matter. The populace was excited against the Templars by addresses delivered by Dominicans in the Royal Palace. Letters were sent by the King to the chief sovereigns of Europe telling them of the charges made against the Templars and urging them to take like measures. Wild stories were circulated about the Templars worshipping an idol in which 'were two carbuncles for eyes, bright as the brightness of heaven, and it is certain that all the hope of the Templars was placed in it; it was their sovereign god, and they trusted in it with all their heart'.[2] There

[1] Dupuy, *Histoire du Procès des Templiers*, ii. 309, quoted by Addison, p. 202.

[2] Addison, p. 203, quoting Dupuy, p. 24, ed. 1713.

were stories, too, of their burning the dead bodies of their members and making the ashes into a powder to be administered to the young members; stories, too, of all sorts of abominations perpetrated by them. In Paris and in many other parts of France the members of the order, including the *servientes*, were seized and subjected to torture in order to obtain confessions. All this was legal; proceedings were taken at the instance and under the direction of Guillaume de Paris, the Chief Inquisitor; it was part of the practice of the Inquisition, once suspicion of heresy was raised, to inflict torture in order to obtain further proof. The torture was frightful; many died under it. Of course, many confessed to every crime imputed to them; they even adhered to their confession; they knew that if they retracted or qualified their confessions they would be tortured again or burnt at the stake as apostates. Unfortunately for the order, Du Molay, the Master, also made a confession and signed it, one which he subsequently withdrew, but of which the King and Pope made the most.

I despair of giving a complete account of the complicated proceedings; even those who have written volumes on the subject have failed to make their narrative clear. I can mention only episodes in proceedings which lasted some six years.

I return to what was being done by the prime movers, Philip and Clement. The latter is for a time indignant that the King is taking action in a matter which belongs to him; the Templars are under papal jurisdiction. But again, he is irresolute; he takes no consistent course. On the 22nd November 1307, by a Bull (*Pastoralis praeeminentiae*) he is stating to the sovereigns of Europe that he is convinced of the truth of

the charges; that they must hold their prisoners and property subject to his orders.

In October of 1307 the Pope gives orders to the Inquisitioners to stop proceedings. But Philip's astute advisers were equal to the occasion and foiled him. The King summoned, 15th April 1308, at Tours, a sort of national assembly before which he laid the various charges, and on the strength of the evidence obtained by torture procured a resolution that the Templars should be put to death.

Pressure was brought to bear upon the vacillating Pope to proceed; he consented to appoint five cardinals to examine the charges. It was a packed commission,[1] and no doubt, too, the witnesses brought before them were picked.

'A portion of them were spontaneous witnesses who had left, or had tried to leave, the Order. The rest, with the terrible penalty for retraction impending over them, confirmed the confessions made before the Inquisition, which in many cases had been extracted by torture.'[2]

The Pope and King being at last substantially at one, everything marched quickly to the end which the latter had in view. The Pope, by the Bull *Facimus misericordiam*, enjoined the bishops throughout Europe to summon the Templars in their dioceses before them and, along with the commissioners appointed by the Pope, to conduct an inquiry into their guilt; provincial councils were to be summoned afterwards to give their decision. By a Bull (*Regnans in coelis*) addressed to all princes and prelates, a general council was summoned at Vienne for the 1st October 1310, to decide the fate of the order, a council which for one reason or another was postponed

[1] Gmelin, p. 388.

[2] H. C. Lea, *History of the Inquisition in the Middle Ages*, iii. 281.

and which did not actually meet until the 16th October 1311.

By this Bull, August 1308, Pope Clement V sent to the various sovereigns of Europe a series of articles or heads of accusations, upon which the Templars were, he suggested, to be interrogated. Those forwarded to England were 87 in number; those used elsewhere were somewhat more numerous.[1] Of some of the charges against the order I can only say that I must leave them in their original Latin; they were charges of systematic immorality, too foul to be mentioned. The opening charge was contained in Article No. 1:

'Quod quilibet in recepcione sua, et quandoque post, vel quam cito ad hec commoditatem recipiens habere poterat, abnegabat Christum, aliquando Crucifixum, et quandoque Jhesum, et quandoque Deum, et aliquandoque Beatam Virginem, et quandoque omnes sanctos et sanctas Dei, inductus seu monitus per illos qui eum recipiebant.—Item, [*quod*] communiter fratres hoc faciebant. —Item, quod maior pars.'

Other articles related to the denial of the Christian faith:

'Item, quod dicebant et dogmatizabant receptores illis quos recipiebant, Christum non esse verum Deum, vel quandoque Jesum, vel quandoque Crucifixum.

Item quod dicebant ipsi illis quos recipiebant, ipsum fuisse falsum prophetam.

Item, ipsum non fuisse passum pro redempcione generis humani, nec crucifixum, sed pro scelleribus suis.'

Then came the charge most insisted upon:

'Item, quod faciebant illos quos recipiebant spuere super crucem, seu super signum vel sculpturam crucis et ymaginem Christi, licet interdum qui recipiebantur spuerent iuxta.—Item quod ipsum crucem pedibus conculcari quandoque mandabant.'[2]

[1] H. C. Lea, *History of the Inquisition in the Middle Ages*, iii. 263.

[2] J. Michelet, *Procès des Templiers*, i. 90.

Another head of charge was the worship of a certain cat:

'Item, quod adorabant quemdam catum, sibi in ipsa congregacione apparentem quandoque.' [1]

They had, too, special idols:

'Item quod ipsi per singulas provincias habebant ydola, videlicet capita quorum aliqua habebant tres facies, et aliqua unam, et aliqua craneum humanum habebant.

'Item quod illa ydola vel illud ydolum adhorabant, et specialiter in eorum magnis capitulis et congregacionibus.'

Articles 48 to 57 were:

'That they worshipped it (this idol) as their God; that some of them did so; that great part did; that they said this head could save them; that it could produce riches; that it had given to the order all its riches; that it caused the earth to bring forth seed; that it made the trees to flourish.' [2]

It would take several lectures to narrate, even in outline, the course of events in other countries; the subject is interesting, partly because for the first time during the last few years the materials have become accessible; but it would necessitate a separate treatment. I will refer, and that briefly only, to what took place in England. At first Edward II refused to act upon the intimation given by Philip on the 16th October 1307; the charges against men held in high honour seemed incredible. But upon receiving the Pope's Bull of the 22nd November 1307 he issued orders for the arrest of the Templars and the sequestration of their property.[3]

In London the inquiry began on the 20th October 1309 before the Bishop of London and the Papal inquisitors. The Templars asserted their innocence; the witnesses

[1] Ibid., i. 91.

[2] Ibid., i. 92.

[3] Rymer's *Foedera*, iii. 18; Lea, iii. 288.

against them were weak and vague. The accusers could make no headway, and for one reason they could not employ torture; the law or custom of the country was against it. The Pope, indignant at this obstacle placed in the way of the inquiry, urged the King to apply torture, law or custom notwithstanding.

'Inhibuisti ne contra ipsas personas et ordinem per *quaestiones* ad inquirendum super eisdem criminibus procedatur, quamvis iidem Templarii diffiteri dicuntur super eisdem articulis veritatem . . . Attende, quaesumus, fili carissime, et prudenti deliberatione considera, si hoc tuo honori et saluti conveniat et statui congruat regni tui.'[1]

The King eventually yielded; it was ordered that, if the prisoner would confess nothing, torture was to be applied:

'et si per huiusmodi arctationes et separationes nihil aliud, quam prius, vellent confiteri, quod extunc *quaestionarentur*; ita quod *quaestiones* illae fierent absque mutilatione et debilitatione perpetua alicuius membri, et sine violenta sanguinis effusione.'[2]

This is the first and probably the only formal recognition of torture in England. But all to no purpose; the Templars were tortured and imprisoned for more than three years; certain hearsay statements absolutely worthless were collected; an excuse was given to the Crown to seize and distribute their property. But of evidence of the truth of the charges there was absolutely none. I quote from Mr. Addison's volume the result of inquiries conducted elsewhere:

'Similar measures had, in the meantime, been prosecuted against the Templars in all parts of Christendom, but no better

[1] Quoted by Addison, p. 243.

[2] Wilkins, *Concilia*, ii 314, quoted by Addison, p. 244.

evidence of their guilt than that above mentioned was ever discovered. The Councils of Tarragona and Aragon, after applying the torture, pronounced the Order free from heresy. In Portugal and in Germany the Templars were declared innocent, and in no place situate beyond the sphere of the influence of the king of France and his creature the pope was a single Templar condemned to death.' [1]

But in France more drastic measures were used. There what may be called the trial of the order began in April, 1310, and that the trial should be unexceptionable and therefore conclusive, citations were served on the Templars to defend the order of which they were members. Under the influence of promises of safety some fifty-four came forward and intimated their intention of defending the order. They had reckoned without their lord. Their offer involved a retractation of all they had confessed, and on the plea that they were relapsed heretics they were, on the 12th May 1310, burnt by order of Philippe de Marigny, archbishop of Sens, and brother of that Enguerrand de Marigny, who was one of the ablest and most sinister of Philip's creatures. If any proof were needed of the utter hypocrisy of the entire proceedings, surely here is evidence enough and to spare.

Council after council in France condemned the order, and the time was now ripe for Papal action. Even so, the Council of Vienne was managed with difficulty. After constant and heavy pressure on the Council from King and Pope, it was resolved to proceed by Papal action alone, and in the result, by the Bull *Vox in excelso*, the order was abolished and its property confiscated; and Philip, having got the material benefits of the prosecution, was content that the motive should appear as policy

[1] Addison, p. 274.

rather than punishment. And so the order was never condemned after all.

What was to be done with the knights themselves? That was left to the determination of the tribunals which had tried them. In the end the majority of them, at any rate in France, rotted in dungeons, but for the head of the order a harsher fate was in store.

The Grand Master, who had been in prison for over five years, was brought before the Commission at Paris. He strenuously denied the truth of his confession:

'Producendo bis signum crucis coram facie sua et in aliis signis pretendere videbatur se esse valde stupefactum de hiis que continebantur super predicta confessione sua et aliis in litteris apostolicis supradictis, dicens inter alia quod si dicti domini commissarii fuissent alii quibus liceret hoc audire, ipse diceret aliud.' [1]

But all in vain. He was hurried to execution. On the scaffold he said:

'I do confess my guilt, which consists in having, to my shame and dishonour, suffered myself, through the pain of torture and the fear of death, to give utterance to falsehoods, imputing scandalous sins and iniquities to an illustrious order, which hath nobly served the cause of Christianity. I disdain to seek a wretched and disgraceful existence by engrafting another lie upon the original falsehood.' [2]

A few words as to the general effect of the evidence and the nature of the proceedings.

First as to the Courts which conducted these numerous inquiries and condemned so many men of different nationalities to torture and death. All is strange at first sight. Feudalism was in full force. Each lord had his own Courts. The King too had his—that was a characteristic

[1] J. Michelet, *Procès des Templiers*, i. 34. [2] Addison, p. 279.

of feudalism. Yet in various countries the Pope set on foot inquiries to be conducted by bishops or their officers, or by the Inquisition, and nowhere (a few cases excepted) was his jurisdiction questioned. The areas of the jurisdiction of the secular Courts were local. They could deal only with offences committed within their territory or, in virtue of the tie of allegiance, by subjects elsewhere. They could not do more; their jurisdiction was territorial; that also was a characteristic of feudalism. The bishops, as ecclesiastical judges in ecclesiastical matters, were similarly restricted to crimes committed within their dioceses. The Inquisition, on the other hand, was virtually without any such limitations; when set up anywhere, it could deal with offences committed anywhere; it could try any one for offences in any country. Usually, too, there were exemptions in virtue of rank or upon other grounds from the jurisdiction of secular courts; but no such limitations operated as to the Inquisition; high and low, prince and peasant, clergy and laymen, were subject to it. Originally all questions as to heresy belonged to the ecclesiastical courts; the secular courts had no concern with them except, when the accused were condemned, to burn or otherwise punish them. But long before the time with which we are now concerned heresy had become a secular offence; consequently the lay courts claimed, emphatically claimed, concurrent jurisdiction; if the ecclesiastical authorities did not do their duty, it behoved the secular judges to intervene, and in virtue of this doctrine, the legal advisers of the French king could force them to take action.

For a time the Pope objected to this threat to his jurisdiction in regard to the order and its members. The answer to this was: 'you charge them with offences

cognizable independently of ecclesiastical law.' The Templars who tried to defend themselves by legal means were in a dilemma. They wanted to appeal to the Pope, and in law they had such a right. But he had handed the matter over to certain cardinals, in particular the cardinal bishop of Palestrina, who was Philip's creature.

I have already stated the charges. But I ought to add that at first they were vague and indefinite; charges of heresy, immorality, and blasphemy. Only gradually and slowly did they take fixed shape, and in the end some of them were put in clever alternative forms, a device familiar to lawyers anxious to get conviction by hook or by crook.

I cannot help quoting the words of Renan with respect to the growth of the charges, the gradual building up of a case against the accused.

'On sent qu'à mesure que l'autorité ecclésiastique élevait une exception pour sauver ces malheureux, des ennemis acharnés leur imputaient de nouveaux crimes pour les perdre. Les calomnieuses machinations qui eurent pour conséquence tant d'affreux supplices se montrent ici dans tout leur jour. Dès les premiers pamphlets de Du Bois, vers 1300, on voit poindre le projet de détruire l'ordre du Temple. Or à ce moment il n'est nullement question des hérésies qu'on imputa à l'ordre tout entier; ces hérésies ne furent inventées que quand on vit que le seul moyen de confisquer les biens de l'ordre était de l'accuser de crimes contre la foi. Ce fut aussi en invoquant des griefs ecclésiastiques que Philippe dépouilla les marchands italiens en 1291, les juifs en 1306. Des accusations semblables furent portées contre Boniface VIII; en général le réquisitoire contre Boniface et le réquisitoire contre les Templiers paraissent coulés dans le même moule. L'histoire qui traitera un jour d'une façon critique la question de la destruction de l'ordre du Temple devra chercher dans les ouvrages de Pierre Du Bois l'explication de cette ténébreuse affaire; il y trouvera la preuve que la suppression de cet ordre fut le résultat d'un plan arrêté au

moins dès l'an 1300, et non la conséquence de prétendues hérésies, qu'on ne trouve alléguées que vers l'an 1307.'[1]

There is great force in M. Renan's observations.

I come to another question: Were the Templars guilty of all or any of those charges? I mean the order as distinct from individual members. What I may call the old view, that is, the view common until certain investigations in the last century, was altogether in favour of their innocence. For a time, I admit, there was much vacillation of opinion among scholars. But I think I am justified in saying that the best opinion to-day is emphatically in favour of their acquittal. In the main the answer to this question depends upon the value of evidence obtained by torture or the threat of it. Now at this time there was a widespread, almost insane, belief in its efficacy as an instrument for eliciting truth. Recognized at first with reluctance by the ecclesiastical court, and subject to certain restrictions, it had become a regular and important means of extracting evidence. The Roman criminal law, to its dishonour, had admitted it in the case of slaves and in certain rare cases of freemen. But the Church virtually cast aside these restrictions; a horrible science upon the subject grew up; we read of machines brought over from the continent to inflict torture upon the English Templars. Probably these trials exhibited the employment of torture on the largest scale ever known. If one distrusts — as, for my part, I profoundly do — all such evidence, the main case against the Templars goes entirely; it was built almost solely upon such evidence. As Dr. Döllinger says: 'Never and nowhere in the

[1] J. E. Renan, *Etudes sur la politique religieuse du règne de Philippe le Bel*, p. 363.

whole of Christendom did a Templar make a confession unless constrained thereto by torture or the fear of it.'[1]

Even when there was not what might be called torture in the Inquisitioner's jargon, devices were habitually employed which made a fair trial impossible, and enabled the Court to extract a series of contradictory answers which the notary taking down the examination might present as something like a confession.

A brief reflection to be made upon the facts of the case is this. There was a series of rules of procedure, skilfully calculated to ensure convictions and to defeat all attempts to set up a defence with success. To name one or two—when the accused denied guilt, torture was applied, and, if he persisted in his denial, with increasing severity wholly at the discretion of the Inquisitor. Another practice fatal to many accused was this. They were not told the names of the witnesses against them; it was probably craftily insinuated that this or that person undisclosed would give evidence against them.

As witnesses against an accused all criminals were competent, while on the other hand they were incompetent as witnesses for him. Further, any one giving legal assistance or counselling him in his defence incurred a grave risk; he was himself liable to be proceeded against as a *fautor* or promoter of heresy. Again, any one retracting or modifying his confession obtained by torture, when the pressure or terror was withdrawn, might be treated as an apostate and as such might be sent to the stake.

Nay, so much was the procedure in favour of the accuser that it was permissible in matters of heresy for the Court

[1] Döllinger, iii. 257; Lea, iii. 260.

to proceed summarily, to disregard all legal forms, to exclude advocates, to dispense with formal judgement.[1]

I have not the time to tell in detail how the will of the unfortunate accused was broken, his mind harassed, his body enfeebled; how he was entangled in contradictions; how deceit was practised upon him by inquisitors, working in secret. But I have said enough to justify me in asserting that in any modern courts of law the admissions extorted by such means and such a system would go for nothing. I think, too, I have said enough to show that the court which condemned the Templars was a magnificent machine, unsurpassed in its power of transforming innocence into guilt; and its greatest achievement was the trial of the Templars.

I say nothing of the gross improbabilities of most of the charges; the improbability, for example, of the practices not being long before disclosed and proclaimed to the world by the many powerful enemies of the order; the contrast between their public conduct and their alleged secret conduct, 'their heroic devotion for the most part to the causes which they were alleged to despise.'

It is rare that we get a piece of genuine independent evidence, but when we find it, that evidence is favourable to the accused. For example, Brother Petrus de Palude Lugdunensis[2] says:

'Quod interfuerat examinacionibus multorum Templariorum, quorum aliqui confitebantur multos ex erroribus contentis in dictis articulis, et aliqui alii eos omnino diffitebantur, et ex multis argumentis videbatur ei quod maior fides esset adhibenda negantibus quam confitentibus.'

And then he proceeds to tell a story of two Templars

[1] F. J. M. Raynouard, *Monuments historiques relatifs à la condamnation des Chevaliers du Temple*, p. 60.

[2] Michelet, ii. 195-6.

riding on one horse in a battle, one recommending himself to Christ, and the other to the Devil.

One or two writers, Prutz in particular, have tried to prove that there was a secret doctrine of the order known only to the initiated; that this doctrine was acquired in the East; and that it substantially agreed with the allegations in the charges. It is an hypothesis industriously supported by Prutz but devoid of real foundation.

There may occasionally have entered into some of the initiatory ceremonials an element of farce and even horseplay. There may too have been rough and coarse expedients employed to test the unconditional obedience of the novice. The knights were soldiers accustomed to the ways of camps; their *servientes* might be men of low birth and of worthless character. In the Middle Ages the grave and the grotesque, things most sacred and those most alien thereto, are rarely far apart; the gargoyles on the cathedrals, figures often vile or comical, are near those of saints and martyrs; and it may be that some of those who on the whole fairly well observed the rule of St. Bernard indulged in unrefined merriment and profane speech. Magnified and distorted, in these incongruities and misplaced mirth was found what in the technical language was called a *vehemens suspicio*; torture did the rest.

As to the order itself, the verdict must be one of acquittal. Among the most heinous crimes revealed by the history of ancient trials are those committed by the prosecutors, and among such criminals Philip and Clement are pre-eminent. Cupidity was at the bottom of the whole proceedings. In Fuller's words, the bees must be burnt if the honey was to be got.

III. JEANNE D'ARC

I COME to what is sometimes spoken of as the most memorable trial in history, one to which men and women turn more and more as it recedes into the past. I mean the trial of Jeanne d'Arc. There is still obscurity as to some points in the story. Certain documents likely, if ever found, to prove of great value are lost; it is not probable that the depositions obtained by the commissioners who were sent to Domrémy and the neighbourhood by the prosecution to collect materials for the purpose of examining her and framing charges against her will ever come to light; they were, we may assume, destroyed by those who found that they were not what they wanted; they told too much in her favour. Fortunately there is, all things considered, a remarkably complete report of the trial which ended in her conviction, and, of the proceedings in the second trial instituted after her death to quash the judgement in the first. Were Jeanne d'Arc not what she is, a memorable figure, were she not the symbol of all that is heroic and pure, her life one of unequalled marvels, her trial would be noteworthy as the most perfect known example of a trial under the ecclesiastical system. To the lawyer (and it is solely as a lawyer that I wish to look at the trial) it is profoundly interesting. Every phase of that system is illustrated in the first trial; and in the second we have, so to speak, the comments and criticisms of experts upon the proceedings in the first. It is as if we had the best of all commentaries, the decision of a court of review or appeal.

The trial has significance for another reason. It is the first leading case in a long series of trials, the scandal and reproach of medieval criminal law. I do not think that we shall understand the case if we view it as an isolated incident, or forget that it is one of the first of great note—perhaps I may say the greatest in all times—of the long series of trials for sorcery. About the time when she suffered at the stake began in intensity the epidemic fear of witchcraft which for two and a half centuries raged all over Europe. True it had not then attained its full virulence; but the causes which led to its spread were all at work and, as I shall show, led to her condemnation.

You are all, of course, familiar with the chief events in her life.

In 1429 the fortunes of France were at a low ebb. From the time of Agincourt there had been almost unbroken successes by the English army. The death of Henry V had not changed matters. Paris was in the hands of the English. There were faction and discord in the land. Charles VII was virtually a fugitive and his followers were scattered and dispirited. The city of Orléans had for five months held out, but it was very hard pressed. It had made overtures to the Duke of Burgundy, the ally of the English, to surrender. The end was not far off. I need not retell the story so often told, how in these straits, she, a maiden of seventeen, coming from her village home in Domrémy, in the marches of Lorraine, went in the winter of 1429 to the King's Court and told Charles of her mission; how she was at first slighted and disbelieved; how in the end she was believed; how she pressed the French to act; how she addressed to Henry VI and the regent Bedford and the English army before Orléans a demand for the surrender of all cities in France;

how she told Bedford she was ready to make peace if they abandoned the land and made compensation for the damage which they had done, otherwise she was commissioned by God to drive them out with a shock of arms such as had not been seen in France for a thousand years.

To the English soldiers she sent a special letter saying:

'You archers and other men at arms who lie before Orléans, go back to your own country in the name of God. If you do not, beware of la Pucelle, and soon you will remember the damage she does you. Take my word for it, you will never hold France, which belongs to the King of Heaven, the son of the blessed Mary. She shall be held by Charles.'

To the commanders of the English—Suffolk, the dreaded Talbot, Scales and others—she sent a missive saying: 'Make answer that you will conclude peace at the city of Orleans. If you do not, so much the worse for you.' To the English regent her haughty message was:

'Duke of Bedford, you who call yourself Regent of France for the King of England, La Pucelle begs and requires you not to bring about your own destruction. If you do not what is reasonable, the French will perform the finest feats of arms ever done in Christendom.' [1]

It is not surprising that, as the chronicler says, the English commanders took no heed of these communications. But that this rustic girl of seventeen should have had so much power over men of rank, ecclesiastics, soldiers, and statesmen of experience, that they sanctioned the sending of these haughty messages, speaks marvellously as to her ascendancy, speaks even more powerfully than the testimony we have of the affection which she inspired among the common people and the awe with

[1] J. Quicherat (ed.), *Procès de condamnation et de réhabilitation de Jeanne d'Arc*, iv. 306–8.

which the soldiers regarded her. I need not tell you how Orléans was relieved, the English abandoning the siege; how new heart was put into the French; how success followed success; how city after city fell into their hands; how beginning her work in February 1429, she was able to be present at the crowning of King Charles VII on the 17th July in the Cathedral of Reims. She then seems to have wished to return to her village; her mission was complete; but the King pressed her to remain and she obeyed. Then, as you know, owing to the energy of the Regent Bedford and the lethargy of the French King, the tide turned against the French. An assault upon Paris failed and Jeanne was wounded; and in fighting with the Burgundians, who had come to the aid of their ally, she was taken prisoner on the 23rd May by the Bastard de Vendôme, a follower of Jean de Luxembourg, Comte de Ligny. The English were exultant, for, as Monstrelet says, they valued her capture more than five hundred fighting men, for there was no captain or chief of whom they were so afraid.[1] Then took place long negotiations for her surrender, her captor refusing to hand her over until his price due under the laws of war was paid, and it was with difficulty that Bedford raised the sum, which was large. She was carried from one prison to another, until she was handed over to Warwick and lodged in the castle at Rouen where she was heavily ironed.

And now as to the trial, which I propose to look at mainly from the point of view of the lawyer, and consequently to ignore some aspects of greater importance. Months passed before she was brought to trial; not until the 3rd January 1431 were letters patent issued ordering

[1] J. Quicherat (ed.), *Procès de condamnation et de réhabilitation de Jeanne d'Arc*, iv. 402.

her to be delivered to Pierre Cauchon, Bishop of Beauvais, a partisan of the English, and not until the 19th February, when the articles of accusation were prepared, can the trial be said to have begun. We shall not appreciate aright her demeanour and conduct unless we bear in mind that she had been in prison and in chains nearly a year before she appeared before her Judges.

And first as to the nature and composition of the Court. It was the Court of the Bishop of Beauvais, and he presided in it; but as was then common in such courts in a trial for heresy or sorcery, there was associated with him a representative of the Inquisition, in this case Jean le Maître, vicar or deputy Inquisitor in the diocese of Rouen for Jean Graveran, General Deputy of Inquisition of France. Le Maître seems to have disliked the business. 'Threats are said to have been freely employed'[1] to overcome his repugnance, and he continued to raise doubts as to his powers to take part in the proceedings until he received a special commission from Graveran.

Along with them sat a large body of assistants or assessors (abbots, priors, doctors of theology, &c.). In all there were some 95 of them. In the public sittings the number varied generally from 14 to 16; but in the sittings of the 22nd of February there were 48. I mention these figures because they indicate, as does so much else in the circumstances of the trial, that the case was deemed one of exceptional gravity and difficulty, one in which all available aid should be obtained. The trial falls into four divisions:

(1) the preparatory proceedings, with a view to frame the charges against the accused;

(2) the trial, in our sense of the word, or the ordinary process as it was termed;

[1] H. C. Lea, *History of the Inquisition in the Middle Ages*, iii. 362.

(3) the first sentence pronounced against her, which was one of imprisonment for life;

(4) the second sentence after her so-called abjuration or apostasy, namely, the sentence that she was to be burnt as a sorceress or a heretic.

As to each of these stages or divisions I would say something. There are, as you know, two great systems of trials. One is that known to this country and now generally adopted in civilized countries, in which an accuser comes forward and formulates precise charges which he offers to prove by evidence. In the secular courts, speaking generally, the prosecutor must state his case at the outset, show his hand, make good his accusations. There is another system now generally discredited, but at the time of which I speak in full operation in all ecclesiastical courts and to some extent adopted in secular courts, in which an accused is arrested on suspicion, no precise charges are made, but a case against him is gradually built up by examination, repeated at discretion in private. Such was the system in operation in the ecclesiastical courts in France; and the preparatory process, as it was termed, consisted in this case in interrogating Jeanne d'Arc chiefly in prison, with a view to obtain material upon which to found charges of sorcery and heresy, a course which shocks one's sense of justice, but which was entirely in accordance with ecclesiastical law.

Obviously there was great difficulty in framing the charges. A commission had been sent to collect evidence against her in Domrémy and the neighbourhood. It had been a failure. It brought back only good reports of one whom country folk knew as a maiden of pious and blameless life. The depositions which were then collected have never seen the light. We may be sure that if they had

contained anything to her discredit they would have been published: The aim of the prosecution was to fasten upon her charges of sorcery and heresy, two things then confounded, and to build up accusations upon her statements as to the voices which she heard and the visions which she saw. The difficulty was to explain away her manifest zeal, her fervent piety, her devotion to the Church and its rights, her purity of life. The extraordinary length of the proceedings—they lasted from the 9th January to the 24th May—and so many other characteristics of the trial testify to the extreme difficulty experienced in arriving at the end in view. So weak was the case at the outset that there was, I am inclined to think, a possibility of an acquittal. Not that acquittal by the ecclesiastical courts would have saved her; she would not have escaped. The English were very envious of her death, as the chronicler has it. The King, or rather Bedford, had paid dearly in order to get her in his power; he had given 10,000 livres in gold and a rent-charge of two or three hundred livres to her captor. In the letter which Henry wrote to the Bishop of Beauvais when she was made prisoner he intimates[1] that he will keep her even if she is acquitted. It is a letter which throughout assumes her guilt. It is notorious, he says, that a certain woman, abandoning the habits and garments of her sex, which is contrary to the Divine Law and abominable in the sight of God, has, clad as a man at arms, done many cruel deeds of bloodshed and seduced and abused simple people, so as to lead them to believe she was sent by God and had knowledge of divine secrets; and because she has been suspected of superstitions, false doctrines, and other crimes of high treason against

[1] *Procès*, i. 19.

Heaven, and also because he has been requested by the University of Paris, he hands her over to the Bishop to be interrogated and proceeded against according to the ordinances of the Divine or Canon Law. Jeanne is to be 'baillée et délivrée réalment et de fait par noz gens et officiers, qui l'ont en leur garde'—a command, by the way, which was never carried out. The end of the letter left no doubt as to the intentions of the King.

'Toutes-voies, c'est nostre entencion de ravoir et reprendre pardevers nous icelle Jehanne, se ainsi estoit qu'elle ne fust convaincue ou actainte des cas dessusdiz, ou d'aucun d'eulx ou d'autre touchans ou regardans nostre dicte foy.'[1]

There were difficulties in the way of prosecuting Jeanne before a subservient Court, difficulties perhaps not to be surmounted but for two facts which I would emphasize. There had come into existence and had by this time been perfected a terribly potent machine, one unsurpassed in efficacy for turning innocence into guilt; one by which all securities for fair play were removed; a system under which even when physical torture was not resorted to, the accused was by repeated examination, by threats, by tricks and devices, by false suggestions, by banishing all counsel or friends, and by lowering the diet, reduced to a condition in which the prosecutor wrung out of his victim what he desired.

'C'était un grand art que celui d'interroger, un art terrible et perfide trop souvent, qui mettait l'accusé à la discrétion du juge. L'accusé devait répondre sans avoir l'assistance d'un conseil et sans avoir eu connaissance de l'information. Il prêtait aussi le serment de dire la vérité.'[2]

The accused was unable to call witnesses; few were

[1] *Procès*, i. 19.

[2] A. Esmein, *Histoire de la procédure criminelle en France*, &c., p. 142.

bold enough to act as counsel in proceedings which exposed them to the risk of being prosecuted for heresy; conviction was a matter of course.

In telling the story of the trials of the Templars in 1307–13 I had occasion to describe this machine, and it was perfected in the interval. It is true that Jeanne d'Arc was brought before a bishop's court, but an Inquisitor was joined with him, and as Dr. Lea has explained, the methods of the Inquisition had by this time been perfected. In the second half of the fifteenth century appeared the *Directorium Inquisitorum* of Eymericus, which shows the system in its completeness extended to all ecclesiastical courts.

I have pointed out that in its early days the Church treated sorcery with comparative mildness; it denounced magical practices and beliefs chiefly because they were absurd and incredible. But from the time of the crusades the theory of the existence and potency of diabolic agencies takes more and more definite shape. For reasons which I am unable wholly to explain, the attention of men was turned as it never before had been to those occult and malign powers believed to be everywhere at work. The most spiritually minded did not escape this infatuation. St. Bernard has much to say as to the devil and his power over men and his many shapes:

'Fingit similitudines, imagines pingit, colores aptat, et in thalamo mentis universa convolvit, si forte consensum eliciat, et afectum inficiat. Offert horribilia de divinitate, terribilia de fide, mirabilia de fidei institutione; et in alveolo mentis veneniferas ingerit potiones, quas in confessione evomere peccator oneratus exhorret.'[1]

[1] Migne, *Patrologia Latina*, clxxxiv, col. 841. [The citation is from a sermon attributed not to St. Bernard, but to his secretary, Nicolas de Montieramey.]

What hitherto was loosely held was accentuated and strengthened by the teaching of St. Thomas Aquinas. Largely through his influence the position of the Church had become fixed and decided and militant in regard to witchcraft and sorcery.

To every man who sat upon that Court the text-book which he looked to as his infallible guide was the *Summa Theologiae* of St. Thomas Aquinas (born 1224 or 1227; died 1274), which for a century and a half had been taught in every University. He had systematized and reduced to a scientific form what had been vague and fluctuating. In his commentary on Job[1] he had discussed the power of demons 'turbationem aeris inducere, ventos concitare, et facere ut ignis de caelo cadat'. Elsewhere he had spoken of the heresy:

'de maleficiis autem sciendum est, quod quidam dixerunt quod maleficium nihil est, quod hoc proveniebat ex infidelitate, quia volebant quod dæmones nihil sunt nisi imaginationes hominum, in quantum scilicet homines imaginabantur eos, et ex ista imaginatione territi ledebantur.'

He rejects that theory and lays it down categorically that the only true explanation of occult agencies was 'Fides vero catholica vult quod dæmones sint aliquid; et possint nocere suis operationibus, et impedire carnalem copulam'.[2]

I do not say that Aquinas was the cause of the death of Jeanne d'Arc. But each person who cross-examined her had in mind the teaching of the Angelic Doctor. It is usually supposed that the war against sorcery began with the Bull of Innocent VIII (December 1484) and the publication and wide dissemination of the *Malleus*

[1] St. Thomas Aquinas, *Commentary on Job*, c. i, lectio 3.

[2] St. Thomas Aquinas, *Quodlibet*, xi. 10.

Maleficarum in 1489—a book which, appearing about the time when printing became common, spread the doctrine as to witchcraft into circles which before had known little as to it and brought about the destruction of thousands of human beings. Strange that one of the first effects of the new art of printing was to give prevalence and power to a pernicious superstition. The undoubtedly great influence of the Bull of 1484 and of this book notwithstanding, I think I am right in saying that the infatuation which had seized learned and unlearned on the subject of sorcery had begun by 1430, and, what is important, that from the time with which we are concerned men and women were no longer equally prosecuted for this offence, but that women were henceforth specifically singled out. Roughly speaking, the trial of Jeanne d'Arc marks the period when the wizard gives place to the witch, when women became the subject of special persecution.

This doctrine as to the prevalence of evil spirits had passed from the books and the teaching of learned men into the beliefs of the people. Before this they had had their own world of spirits and sprites and elves and fairies and goblins, the tenants of wood and grove, hill and stream; some of them evil, some wayward and fantastic; but for the most part not unfriendly; open to propitiation, and some of them kindly. But under the influences of which I speak all this was changed: theology had poisoned mythology; it had destroyed the good spirits; and where men had seen varied shapes, beautiful, mysterious, and romantic, they were taught to see only the Devil, their enemy, and his many agents always at work. The very conscience itself of the best of men when it spoke loudest—when the soul heard as it were an inward voice bidding it obey a divine law—was made the ground of

condemnation; those inward monitors were the most alluring promptings of Satan. Leibnitz designated the thirteenth century as the stupidest of all centuries, and Roskoff in his learned history of the Devil says that that was the *eigentliche Teufelsperiode*—the period in which the Devil had full ascendancy. But it lasted unimpaired until, and long after, the trial with which we have to deal.

I come to the second stage of the trial, the ordinary process as it was called. John d'Estivet, the promotor or prosecutor, prepared certain articles of accusation which Jeanne was to be called upon to answer upon oath. They were seventy in number, drawn up with minuteness and skill and many of them turning upon subtle distinctions. To each of these she was required to answer, and upon such answers were founded other questions, some of them designed to entrap or confuse her. An important episode in this second stage was the submitting of a series of propositions extracted from the evidence of the accused to sixteen doctors and six licentiates and bachelors of theology for their opinion. Almost all of them were more or less unfavourable to her. Some of the answers were based on assumptions contrary to the evidence.[1] There was one exception to the tone of hostility. Master John Carin, Canon of Rouen, said he thought the statements were in accordance with the laws of the Church.[2] There are signs that the Chapter of Rouen shirked responsibility and that there was difficulty in getting a majority[3] adverse to the prisoner. Another circumstance of the trial was the part taken in it by the University of Paris, which at that time possessed transcendant authority in law and theology. Though not binding on courts, its opinions had much the same weight

[1] *Procès*, i. 343. [2] Ibid., i. 353. [3] Ibid., i. 353 *n*.

as those of the Jurisconsulti at Rome. At this time the University was under the domination of the English. It had just taken a strong line in denouncing magic and sorcery. It had also addressed a letter to the Bishop of Beauvais urging him to proceed with the prosecution in order that this scandal to the faith might be removed and pressing for the trial to take place in Paris, where there were plenty of learned men who would consider the matter maturely. The result of appealing to the University was no doubt what was expected, altogether adverse. The so-called revelations were either pernicious falsehoods or superstitions, and apparitions and revelations proceeding from evil spirits, Belial, Satan, and Behemoth. Her wearing man's dress was declared to be blasphemy; she was a despiser of God and justly suspect of idolatry.

I say little as to the details of the second stage, and of the prolonged and pitiless cross-examination, resumed day after day, to which she was subjected. But this much may be observed—her demeanour and conduct, even as recorded in the unfriendly official narrative, are marvellous. Speaking with some experience of courts of law, and with some acquaintance with the literature of trials, I know nothing in history comparable to her bearing under pressure and strain which would have broken the strongest and most heroic. It is not Bruno or Servetus or Galileo or Campanella that stands out beyond all others in the somewhat long history of martyrs under legal process. It is this village maiden with her courage, her union of faith, enthusiasm, and supreme sanity. The inner voices speak to her; she has visions; they do not dazzle her understanding or confuse her clear apprehension of practical things. 'When she spoke of matters of state and war (*de regno et guerra*),' said one who was present

at the trial, 'she seemed moved by the Holy Spirit.'[1] Another witness says that he :

'bene recolit quod frequenter fiebant eidem Johannae fracta interrogatoria ; et concurrebant interrogatoria difficilia a pluribus ; et, priusquam uni respondisset, alius faciebat aliam interrogationem, unde erat male contenta, dicendo : "Faciatis unus post alium." Et mirabatur loquens qualiter poterat respondere interrogationibus subtilibus et captiosis sibi factis ; et quod homo litteratus vix bene respondisset.'[2]

The testimony of Manchon, the notary, who probably saw as much of her as did any one, is :

'interdum satis prudenter, et interdum satis simpliciter, respondebat, prout videri potest in processu ; et credit quod, in tam difficili causa, non erat ex se sufficiens ad se defendendum contra tantos doctores, nisi fuisset sibi inspiratum.'[3]

Her cross-examiners, who were adroit and versed in all the little arts by which a witness is confused and entangled in contradiction, made much of the fact that she as a child had gone on May-day with others of her own age to the forest near Domrémy and had danced under an old oak which was associated with fairies. It was sought to entangle her in fatal admissions. Her simple straightforwardness foiled her interrogators ; she had heard speak of fairies and their doings ; but she does not believe in them ; they are only sorcery.

It is worth noting that Gerson, the famous rector of the University, who refused to join in the demand for her prosecution, in recommending a revision, lays stress on her practical wisdom and sagacity :

'Ponderandum est ad extremum quod haec Puella et ei adhaerentes milites non dimittunt vias humanae prudentiae, faciendo

[1] *Procès*, ii. 304. [2] Ibid., ii. 332. [3] Ibid., ii. 342.

scilicet quod in se est, quod appareat tentari Deus ultra quam necesse est.' [1]

One thinks of Socrates before the Heliastic Court. But after all, we know of his demeanour before his Judges only or mainly through the accounts of his affectionate disciples; her virtues and sagacity shine out through the record prepared by her enemies. It is not for me to say anything of her skill in war. M. Anatole France disparages it, and I do not dispute his decision on questions of strategy, though I may observe that the soldiers who fought along with her, and especially the English who fought against her, thought otherwise; and it must be plain that their terror of her prowess was at the bottom of the proceedings. The perspicacity of this young maiden in discerning the weak points of the besiegers of Orléans reminds one of the insight of a certain lieutenant of artillery who some four hundred years afterwards notes the vulnerable points of the defenders of Toulon. This much I must say, that one carries away from the trial the impression of a high practical intelligence united to faith and courage.

I will say little of the so-called abjuration or recantation of which the history is at some points obscure. That a pile ready to be lit was erected in the cemetery of St.-Ouen; that there under threats and persuasion and promises and broken down with suffering, physical and mental, she put her cross to a document (for she could not read or write) is certain. But whether, as is not improbable, one document was substituted for another, is not clear. But it is absurd to suggest that she with no one to counsel her could understand the contents of either paper. Broken in body with long and repeated torture

[1] Ibid., iii. 303.

—for such the circumstances of her prison life were—fasting as she did, and exposed to acts of violence at the hands of evil men—acts so foul that her prosecutors ordered their removal—she could not appreciate what she was pressed to do. There was a struggle going on between the prisoner and the Court, another unseen struggle between the Court and the English. The latter were becoming impatient; they did not understand these delays; they wanted her made away with promptly; the exigencies of war demanded it, if the spell of her influence was to be broken. Now the Bishop of Beauvais, while ready to do their work and earn his right to the archbishopric of Rouen, wanted to preserve forms and appearances, and doubtless thought that he would serve his masters by ordering her perpetual imprisonment, and to that effect was the sentence of the Court which forms what I may call the third stage. It pronounces as follows:

'Dicimus et decrevimus te gravissime deliquisse, revelationes et apparitiones mendose confingendo, alios seducendo, leviter et temere credendo, superstitiose divinando, blasphemando Deum et Sanctas, praevaricando legem, sacram Scripturam et canonicas sanctiones, contemnendo Deum in suis sacramentis, seditiones moliendo, apostatando, crimen schismatis incurrendo, et in fide catholica multipliciter errando.' [1]

But inasmuch as she had publicly abjured these errors the Court would be merciful and accordingly condemned her to perpetual imprisonment, there to eat the bread of sorrow and drink the water of affliction, there to weep for things done, and there to do nothing hereafter that need to be wept for. It would seem that for a day or two she was willing to accept her fate and to conform to what was enjoined. Thus she consented to wear woman's dress.

[1] *Procès*, i. 451.

The English were vexed and furious at this ending to the trial, which did not meet their views. There is a story of a quarrel between the bishop and the chaplain of Cardinal Beaufort. Irritated at their delays the chaplain accused the bishop of being her partisan, whereupon the bishop gave him the lie; and we read too of the ecclesiastics being threatened with death by the English.

The sentence was given on the 24th of May. But when the bishop and some of his assessors visited her in prison on the 28th, they found her changed; she had taken again man's dress—perhaps because her keepers had cunningly removed her woman's dress, or, to quote the official account of what she said, 'quia erat sibi magis licitum vel conveniens habere habitum virilem, dum erat inter viros, quam habere habitum mulierum.'[1] She had not understood the promise which they said she had made; and they had not kept their promise to allow her to go to mass and to take off her fetters. Her courage had come back to her; the Divine voices had spoken to her again. Then, to quote the official report, she declared that she did not say or understand that she was recanting her apparitions, to wit, that they were St. Margaret and St. Katharine; and that all she did in signing a paper was from fear of being burnt, and that she revoked nothing but what was contrary to truth. Also that she would rather do penance once for all, that is die, than longer suffer imprisonment in the castle where she was in the hands of the secular power. Also that she had done nothing against God or faith, whatever they may have made her abjure, and as for what was in the document of abjuration, she did not understand it. Also that she now says that she intended to revoke nothing, unless it so pleased God. If

[1] Ibid., i. 455.

her judges wish, she would take the woman's dress again. As to the rest she would do nothing more. After this the bishop, according to one witness,[1] said to the English who were waiting outside, to hear the result: 'Farewell, be of good cheer. It is done.' And so it was. The end came swiftly. That was on the 28th May. On the 30th came the sentence which recited her errors, her promise to abjure them, her relapse, and pronounced her:

'revelationum et apparitionum divinarum mendosam confictricem, perniciosam seductricem, praesumptuosam, . . . divinatricem, blasphemam in Deum, Sanctos et Sanctas, et ipsius Dei in suis sacramentis contemptricem, legis divinae, sacrae doctrinae ac sanctionum ecclesiasticarum praevaricatricem, seditiosam, crudelem, apostatricem, schismaticam, in fide nostra multipliciter errantem.'

The sentence ended by declaring her 'tanquam membrum Satanae, ab Ecclesia praecisum, lepra haeresis infectum' and condemned her to be handed over, lest she infect others, to the civil power.[2]

The final stage was in the market-place at Rouen, where with a paper crown on her head marked 'Heretic, Relapsed Idolator, Apostate' she was burnt. Her last-recorded act was her clasping the crucifix in the flames. Her persecutors' last acts were to tear aside the faggots to show to the crowd that she was in truth a woman and to cast her ashes in the Seine. Doubtless many thought that an evil deed had been done. But we find no clear evidence of a general revulsion. That the bishop and his colleagues were uneasy is certain. They sought to manufacture fresh evidence against her based on alleged statements made by her in prison, statements which the

[1] *Procès*, ii. 5.

[2] Ibid., i. 474, 475.

notaries refused to sign. But they did not incur punishment or apparently general reprobation.

Not until 1450 was anything done to efface the sentence and to vindicate her memory. The King then commissioned Maître Bouillé to inquire into the matter and report to the Grand Council. A large amount of evidence was collected going to show the unfairness of the trial, not the least important and cogent being that of Manchon, the notary who prepared the official report. The opinions of some of the best canon lawyers were taken as to the validity of the proceedings and as to the twelve articles extracted by the prosecution from the confession of Jeanne. A suit was instituted at the instance of her mother and her two brothers against the heirs of Peter Cauchon, the bishop, who were cited, and who duly appeared. Sentence of contumacy was pronounced against Estivet the promoter, and Le Maître, the Inquisitor, who did not appear. A vast mass of evidence was collected; statements by soldiers of rank who had fought along with her, by those who had known her in Court and in prison; statements all testifying to her purity, her firm belief in her mission, and her courage in the presence of her judges; among such statements were those by men who in silence and without protest had seen her suffer. The proceedings lasted from the 7th November 1455 to the 7th June 1456, when the Commissioners delivered their judgement to the effect that the articles of accusation against her had been extracted from her evidence 'corrupte, dolose, calumniose, fraudulenter et malitiose';[1] that aggravating circumstances had been fraudulently inserted; that the articles must be annulled as 'false, calumniose, dolose extractos, et a confessione

[1] Ibid., iii. 359.

eadem difformes'; that, in view of her repeated requests to be allowed to appeal to the Holy See and the fact that her so-called apostacy was obtained by fear and duress, by the presence of the torturer and the threat of fire, the sentence and whole proceedings were declared 'dolum, calumniam, iniquitatem, repugnantiam, iurisque et facti errorem continentes manifestum' and as such null and void.'[1]

I quote this judgement and lay stress upon it, to show that in the opinion of contemporaries her condemnation was not a miscarriage of justice by honest men. That also is the impression which the trial leaves upon me. For a time I was inclined to see in the whole proceedings something like the scene in an African kraal when a howling mob of terrified naked savages dances round a wretched woman whom a witch doctor has smelled out. That comparison would be false. The trial was not the work of men carried away by fanaticism and sure that they were right, but of men who suspected that they were wrong, and who sought to attain their end while dividing responsibility. To her captors her execution as a sorcerer was, in modern phrase, a matter of military exigency; there were others seeking to imitate her; and an end must be put to the notion that Divine agencies were working for their defeat and expulsion from France. Not merely did they wish her to die, but in a particular way. Guillelmus de Camera,[2] a doctor of medicine who visited her in prison when she was ill, told how he and another doctor were sent for by Warwick and how the Earl told them that they must attend to her because the King would on no account that she should

[1] *Procès*, iii. 361. For defects of law see ii. 56, 64.

[2] Ibid., iii. 51.

die by a natural death. The King had paid dearly for her and he would not have her die except at the hands of justice; she must be burnt, and they must look carefully after her that she might be cured. Finding, on examining her, that she was feverish, they recommended bleeding. But when they told this to Warwick, he said: 'You be careful about bleeding; it is a ticklish matter; she might die,' which would not suit the purpose of those who wanted a public execution for military and political ends.

Fear, hatred, a sense of shame at reverses at the hands of a woman, apprehensions of a rise of national feeling, actuated Bedford and Warwick. The judges and assessors had a mind to do 'bonne justice'; to keep the letter of the law and to do the work of the party in power. On the whole proceedings there is the stain of hypocrisy as well as of cruelty.

I should have liked, had time permitted, to say something as to the celestial voices which she heard and to contrast them with the monition of the 'demon' of Socrates to which I had to refer in speaking of his trial; in particular to contrast the manner in which each spoke of the internal monitor, the clear, matter-of-fact, candid statements of Socrates and the reticence or reserve of Jeanne d'Arc when questioned again and again by her judges as to the nature of the voices. But this subject would carry one too far. Three observations in conclusion I will make, and I crave indulgence for them because they travel somewhat outside the province of the lawyer, the limits which I have prescribed for myself. The first is to say how much I desire to see put into plain words without adornment and without importation of sentiment the story of her life, including the second trial, and

that every school-child should read it. It is, or it might well be, the true modern epic; the story of all others embodying for this generation and those to come the ideal of all that is heroic, an ideal which makes a nearer appeal to the men and women of to-day. For her own time did not recognize her, nor did subsequent ages. I have been struck by the little evidence of recognition of her place and work. I have come upon a frigid epigram and some poems which put her in a false light. It is noteworthy that the two greatest geniuses of the countries which did her wrong misunderstood and disparaged her. I have met in recent times with no generous and adequate words until the last century. I will not say that she was discovered by the nineteenth century, but only then was she placed where I believe she will remain.

The second observation I would make is to bid you remember in extenuation of the age which suffered all this injustice to be done that side by side with brutality and coarseness was purity and exalted heroism; that if there were many oppressors, there were also many martyrs; that if among many life was coarse and mean, there were others who heard and obeyed Divine voices which, rationalize them as much as you may, were the calls and monitions of tender or imperious consciences, and that the very legal system under which all this cruelty was wrought was intended to do what modern criminologists say is the true aim, to cure rather than punish the guilty. The age of St. Francis was not far off from that which burnt Jeanne d'Arc. The Imitation was written by one who conceivably might have known her. These conjunctions or contrasts are among the mysteries of life. And terrible to accused persons though the Inquisition was, their fate in a secular Court might have been worse.

'The Inquisition was concerned exclusively with belief; acts were of interest to it merely as evidence of the beliefs which they inferred, and all heresies were equal in guilt, whether they consisted in affirming the poverty of Christ or led to demon worship, pacts with Satan, and attempts on human life. The sorcerer might, therefore, well prefer to fall into the hands of the Inquisition rather than to be judged by the secular tribunals, for in the former case he had the benefit of the invariable rules observed in dealings with heresy.' [1]

My last observation is to repeat my impression of her character as derived from a study of the trial. It is one of those rare unions of strength, heroism and sanity, with mysticism, sagacity, and grasp of facts. Her life in the invisible world did not blind her practical wisdom, conspicuous in the strange atmosphere of courts, and doubtless also in the more familiar scenes of sieges and battle-fields.

[1] Lea, iii. 449.

IV. GIORDANO BRUNO

TO-DAY I take an illustration from the ecclesiastical system of procedure which, as I have remarked, profoundly influenced that of the ordinary secular courts of law—a system constructed with scientific skill, which has not been sufficiently recognized. Of it may truly be said what Monsieur Fournier remarks generally:

'La constitution séculaire de l'Eglise s'y montre comme un monument majestueux à la construction duquel la Rome chrétienne a apporté, avec la vigueur de la foi nouvelle, les traditions de gouvernement qu'elle avait reçues des maîtres du monde.' [1]

I have chosen the trial of Giordano Bruno as typical of many trials. It is perhaps the most nearly complete account which we have of one kind of trials; I mean trials of men who suffered the extreme penalty on account of their opinions; those who were the victims of a marvellous system of censorship over thought; a long list including Vanini, Campanella, Galileo, Servetus; some of the best-known benefactors of humanity, and a crowd of forgotten men who paid with their lives for their zeal and enlightenment. I do not propose to speak of their work or their teaching or their place in history, except briefly and incidentally. I am not concerned with philosophy or general history. I regard these trials chiefly as events in legal history; examples of various modes of procedure, of the many ways in which men have satisfied themselves that their fellows merit punishment. One consequence is that I shall have to leave out some of

[1] P. Fournier, *Les Officialités au Moyen Âge*, p. 1.

the chief elements of interest, to dwell on the various legal steps in the proceedings; to speak of matters which you may justly think of less moment than those omitted.

To understand the trial of Bruno something must be said of his contemporaries and of the circumstances of his life.

He was born at Nola in Calabria in 1548, in momentous, restless times; when new and subversive ideas were in the air; when the talk was of new discoveries of all sorts; when there was much questioning as to old beliefs; some thirteen years before Bacon, whose attitude to scholastic philosophy was to be not unlike Bruno's, many of whose most memorable sayings seem echoes of Bruno; some five years after the death of Copernicus, of whose teaching he was to be the passionate exponent; some sixteen years before Galileo, who was to suffer for much the same offences before the same tribunal; some sixteen years before Shakespeare, in whose sonnets and some of whose plays, e. g. *The Tempest* and *Hamlet*, critics have found a curious resemblance to Bruno's poems; some eighty years before Spinoza, whom he was to influence deeply; nearly one hundred before Leibnitz, whom also he influenced. It was a time of marvellous changes. The world had been enlarged by the discovery of America; the heavens indefinitely expanded, new worlds revealed by the teaching of Copernicus: Luther was dead some two years; the Reformation was being met by a counter-movement; and, what for Bruno was all-important, there was a revival of activity on the part of the Inquisition. It was a bad time for men who thought and spoke freely, and it was a time which tempted bold spirits to do so. Bruno was born in the full tide of the Renaissance, and the man himself was typical of it. The son of a

soldier and perhaps meant for that profession, he had become a Dominican without any vocation. Turbulent, wayward, somewhat quarrelsome, thirsting for knowledge of all sorts, he early got into troubles from which he never extricated himself. As he said, if you button the first button of your coat wrong, the rest gets awry. And so it was with him. His questions and bold remarks as a young monk aroused the suspicions of his superiors as to his heresies. He was reprimanded more than once. He was denounced to the Inquisition at Naples,[1] which cited him to appear; in fact two suits against him were instituted. He did not obey, but fled, and was condemned as being contumacious. From that time his life was passed in wandering from country to country. He is indeed the very type of the vagabond scholar, then so common. He went from place to place, lecturing, talking, declaiming, maintaining paradoxes, a restless, roaming spirit; never out of controversies, generally conducted with asperity, and rarely long anywhere without a quarrel.

Bruno never remained long in one place; Geneva, Toulouse, Paris, Oxford, Marburg, Prague, Frankfort, were successively visited. A wandering life such as his was possible in a way which is not so now. European scholars were more cosmopolitan then than now. All men of culture knew Latin. Many spoke it fluently. The Universities gave an opening to them. If they were Churchmen, the monasteries afforded them lodging. Gifted and fascinating, Bruno made friends as well as enemies wherever he went. He was in high favour with Henry III of France, and in England he lived at various times from 1583 to 1585 as a guest in the house of

[1] D. Berti, *Vita di Giordano Bruno da Nola* (1868), pp. 54, 57.

Michel Castelnau de Mauvissière, the French ambassador. He knew the statesmen of the time, Walsingham and Burghley and Mendoza. He was the friend of Sir Philip Sidney and of Fulke Greville and probably of Spenser. It has been conjectured that he knew Shakespeare. But he seems to have returned to France before Shakespeare came to London. He did not suffer fools, and still less pedants, gladly. Quarrelsome, disputatious, brimful of novelties, he generally soon made every place too hot for him. He alternated between flattery and abuse. He was a firebrand, assertive, combative. There was in him no meekness, no reticence as to his merits; when he was smitten, he struck back. In his addresses to Oxford University he describes himself as—

'professor of a purer and less harmful learning, known in the chief universities of Europe, a philosopher approved and honourably received, . . . a wakener of sleeping minds, tamer of presumptuous and obstinate ignorance, who in all respects professes a general love of man, and cares not for the Italian more than for the Briton, male more than female, the mitre more than the crown, the toga more than the coat of mail, the cowled more than the uncowled; but loves him who in intercourse is the more peaceable, polite, friendly and useful; whom only propagators of folly and hypocrites detest, whom the honourable and studious love, whom noble minds applaud.' [1]

No single phrase would sum up a singularly varied nature in which was a bit of Shelley, much that is akin to Spinoza, and an element of extravagance and buffoonery which recalls Rabelais. Added to all a certain devouring restless activity; ardour about invisible things; obsession, I might even say intoxication, with the effects of the great discoveries of his time, and a certain blind

[1] J. L. MacIntyre, *Giordano Bruno*, p. 22.

rush, as it might seem, to destruction. 'That I shall sink in death', says one of his sonnets:

> 'That I shall sink in death I know must be,
> But with that death of mine what life will vie?'[1]

To Bruno Copernicus's teaching was not, as to many of his contemporaries, a mere hypothesis; it was a truth to be preached with passionate enthusiasm in and out of season. To him that time when the magnitude of the universe first dawned upon men, in which the aspects of the heavens and the earth were changed, the conception of the infinitude of space and the plurality of worlds opened up, seemed the Great Divide, the true watershed of the world's history. Even now one sees a certain glow in his pages, one feels a certain heat in his comments, when he touches that theme. He delights in endless metaphors. He is inspired by that enthusiasm or rapture which combines man with God.

'It seemed to Bruno', and here I quote from Höffding,[2] 'as if he had never breathed freely until the limits of the universe had been extended to infinity, and the fixed spheres had disappeared. No longer now was there a limit to the flight of the spirit, no "so far and no farther"; the narrow prison in which the old beliefs had confined men's spirits had now to open its gates and let in the pure air of a new life.'

Long before his trial, he had written in verse and prose much especially on philosophy, the purport of his teaching being often uncertain; his ideas so wrapped in metaphors and allegories as to be elusive, but running through most of them was a belief in the unity of all nature, in an endlessly enduring universe, in the infinity of space, in the plurality of worlds; a vein of strong antagonism to the

[1] *De gl' heroici Furori*, 3rd Dialogue, Sonnet 16.

[2] H. Höffding, *A History of Modern Philosophy*, i. 129.

teaching of Aristotle, then dominant; a protest against authority; 'an attempt, very remarkable for the time, to unite a fundamentally idealistic conception with the scientific conception of the world'.[1] He joins hands in the past with Plato and Plotinus and Nicholas of Cusa as to the original unity of all things, but he is also 'the precursor of Lessing's and Kant's idea of eternal striving as the highest; as, too, his attitude towards the idea of the golden age reminds us of the modern conception of the history of civilization'.[2]

Höffding, from whom I have quoted, describes his teaching as 'the greatest philosophical thought-structure executed by the Renaissance'.[3] He is among the first of the moderns.

Known as Bruno was all over Europe, for the tendency of his copious writings,[4] familiar to the Inquisition, already defendant in two prosecutions, and condemned for contumacy by one tribunal, it was sheer madness for him to venture into Italy from which he had fled to escape punishment and where he must expect to be punished as contumacious. It is true that he went to Venice, which was at that time not only distinguished among Italian states for fostering learning, but was also a city of refuge for many who were not safe elsewhere. Its courts, too, had a high reputation. He would be less in peril there than anywhere else. But it was madness to venture there, so some of his friends thought. It has been suggested that he went in the hope of being reconciled to the Church by dedicating a work to the new Pope,

[1] Ibid., i. 139. [2] Ibid., i. 148. [3] Ibid., i. 110.

[4] *La Cena de le Ceneri, De la Causa, principio et Uno, De l'infinito universo et Mondi, Spaccio de la Bestia trionfante, Cabala del Cavallo Pegaseo, De gl' heroici furori, etc.*

Gregory XIV, less intractable than his predecessor, Sixtus V. Probably he would not have gone to Venice but for his having been lured there by one who professed to be his friend and was his pupil, Giovanni Mocenigo, a member of a noble Venetian family of that name, a man of weak, vain, and envious disposition, who was desirous to be taught by Bruno certain secrets as to the memory (*secreti della memoria*) of which he believed Bruno was the depositary. With some plausibility it has been suggested that Bruno fell into a trap set for him by the Inquisition.

'Mocenigo had been one of the Savii all' Eresia—the assessors appointed by the State to the Inquisition Board in Venice—and was therefore familiar with the intrigues of that body. He was also under the influence of his Father Confessor, by whose orders he denounced Bruno. The proceedings make it extremely probable, therefore, that the Inquisition laid a trap for Bruno, into which he unsuspectingly walked.' [1]

This conjecture cannot be accepted. Those who formed such a plot would not have given him the many opportunities of escaping which he had.

Bruno arrived in Venice in the autumn of 1591. Not until the 23rd May 1592 was he arrested and put in prison. There is the further circumstance, as pointed out by Miss Plumptre,[2] that he spent eight months on the road, staying at Zurich and Padua. The Inquisition did not do its work in this dilatory fashion. It struck, when it did strike, promptly. In the envious, superstitious, narrow nature of a pupil disappointed at not having acquired the secret knowledge which he hoped for and paid for, we have explanation enough of the action of Mocenigo.

[1] MacIntyre, p. 68.

[2] C. E. Plumptre, *Studies in Little-known Subjects*, p. 120.

Bruno was arrested by Mocenigo on the 23rd May 1592, and handed over to the authorities. The tribunal before which he was brought was the Inquisition. That of Venice had distinct features of its own. Its origin and composition were peculiar. It was not a mere dependency of the Court of Rome. The great champion of the rights of the Republic in its conflict with the Papacy, Paolo Sarpi, wrote a work in which he describes the origin of the Inquisition in Venice and its relations to Rome. He insists that:

'The office of the Inquisition in this state is not dependent on the Roman Curia, but belongs to the Most Serene Republic, and is independent, being erected and set up by the same, and established by agreement and concordat with the Apostolic See; and therefore it ought to be governed by its own customs and ordinances, and under no obligation to take orders from elsewhere.' [1]

The Republic did not admit that the tribunal was a wholly ecclesiastical institution. Sarpi emphatically dwells on this:

'Every criminal trial has three parts: the examination of the *ratio delicti*, the examination of the facts and the sentence.' [2]

'The first examination, that is to say, what opinion is heretical, has always been an ecclesiastical matter, and cannot in any way belong to the secular power . . . but the examination of the facts, whether the accused be innocent, or guilty, for the purpose of awarding the punishment ordained by the statutes, and in either case the sentence of absolution or of condemnation, entirely belong to the secular power.' [3]

As early as 1249 the Government of Venice took a line of its own; it appointed men of its choice to sit along with ecclesiastics in heresy cases.[4] Accordingly the

[1] P. Sarpi, *Discorso dell' Origine, etc.* (1639), p. 36.
[2] Ibid., p. 20. [3] Ibid., pp. 21, 53. [4] Ibid., p. 33.

tribunal of the Inquisition at Venice was unlike the ordinary tribunal; it was composed of the Papal Nuncio, the Patriarch, the Padre Inquisitore and three assistants known as the Savii all' Eresia, whose presence was requisite for the validity of proceedings. They were nominated every year by the Government. They were sworn to conceal from the doge and senate nothing which was done by the Holy Office and to suspend all proceedings which they deemed contrary to the laws or customs of the State or the secret instructions which they had received; restrictions which the Court of Rome sought to remove but to which the Government of the Republic firmly adhered.[1]

In earlier lectures I have described the course of a prosecution under the ecclesiastical system. It was derived from the later Roman law of procedure. To quote M. Fournier:

'La procédure en usage dans les tribunaux ecclésiastiques à l'époque dont nous nous occupons est la procédure du Code et des Novelles, modifiée, et simplifiée par les Decrétales . . . Le fond de cette procédure se trouve dans les compilations de Justinien.'[2]

I may again mention the chief steps in a prosecution conducted under this system:

(1) The initiation of proceedings, which might be in three ways: (*a*) by accusation, as it was called, which took the form of an *inscriptio libelli* containing a definite charge by a definite accuser, a method rarely used;[3] (*b*) by denunciation made secretly by an informer, the denunciator or informer sworn to maintain secrecy as to

[1] P. van Limborch, *Historia Inquisitionis* (Amsterdam, 1692), p. 63.

[2] Fournier, p. 129; see also for ecclesiastical procedure, N. München, *Das kanonische Gerichtsverfahren und Strafrecht.*

[3] As to *libellus*, see Fournier, pp. 131, 242.

the matters alleged against the accused[1] (this became the common method);[2] (*c*) by motion on the part of the Court itself, a method introduced in 1198 by Innocent III, a Pope who was a great lawyer as well as statesman.[3]

(2) Next the preliminary inquiry, secretly conducted, to ascertain whether there was a case against the accused. Witnesses were called, their names being carefully kept from the accused. 'Caveat Inquisitor ne accusantes accusatis revelet' was a maxim of the system.[4]

(3) Next the arrest and imprisonment.

(4) Then came the interrogation of the accused, secret also; it might be before the full Court or in prison; it might be frequently repeated and also without communication of the names of the witnesses against him. There were elaborate rules, founded on long experience and a profound knowledge of mental pathology and of the weakness of human nature, for breaking down every form of constancy and for working upon every motive; threats, promises, flattery, suggestions of confessions by accomplices, every artifice, and if need be, torture, were freely used.[5] Reading the advice given and precepts enunciated by Eymeric in his *Directorium Inquisitorium*, one sees how crude and unscientific are the tricks and devices of modern cross-examinations as compared with those in use in this tribunal. Eymeric[6] treats 'de modis decem hereticorum quibus errores suos obtegere student':

[1] Limborch, p. 263.

[2] As to procedure by denunciation, Fournier, p. 256.

[3] Ibid., p. 268.

[4] Limborch, p. 261.

[5] Ibid., ch. xiv: 'Quibus artibus Inquisitores e captivis confessionem elicere studeant,' p. 277.

[6] N. Eymericus, *Directorium Inquisitorium* (1607), 3rd part, p. 430.

(1) Primus est per verborum æquivocationem ;

(2) secundus modus evadendi et sophisticandi est per conditionis adiectionem ;

(3) per quaestionis seu interrogationis retorsionem ;

(4) per verborum fictam admirationem ;

(5) per verborum tergiversationem . . . si non respondet de iuramento de quo quaeritur sed de dicendo verum de quo non quaeritur ;

(6) per verborum manifestam translationem ;

(7) per sui iustificationem ;

(8) per sui corporis fictam debilitatem ;

(9) per fatuitatis seu imprudentiae simulationem ;

(10) per palliatae sanctitatis conversationem—simulated external signs of holiness. 'Multos autem et alios modos varios decipiendi et se palliandi habent quos probat magis usus quam ars, prout in eorum inquisitionibus invenitur.'

I doubt whether more intelligence has ever been put at the service of law than in devising and working the machinery of this system, which did untold evil.[1]

(5) The last step in the proceedings was the sentence of the court which might be either acquittal or some form of ecclesiastical punishment ; or the accused might be delivered over to the civil power, to be dealt with 'without effusion of blood', the correct and polite description of being burnt.

In name at all events the court had all the modern theories as to punishment ; it rarely inflicted vindictive sentences ; they were chiefly curative or medicinal for the good of the soul ; it administered probationary or conditional sentences ; in form it curiously anticipated the teaching of modern criminologists.

[1] Gonsalvius, quoted by Limborch, p. 281.

I sum up the features of the system in saying that there were no pleadings in public, no production or confrontation of witnesses, no cross-examination of them, no right to be represented by an advocate,[1] or even to call witnesses, and that the court was at liberty to disregard all forms and proceed summarily.

Certain parts of the proceedings may remind you of modern theories of penal reform. But the substance of the system recalls the delation by informers under Tiberius and Nero, which Tacitus pictures, a system which put every man's life and fortune at the mercy of secret enemies or envious busybodies.

And now as to the steps taken in this case.

23 May 1592. Denunciation of Bruno by Mocenigo to the Padre Inquisitore, as Mocenigo explained, 'under pressure from my conscience and by order of my confessor.' He charges him with grave heresies; states that Bruno had had difficulties at Rome with the Inquisition. In his denunciation he mentions two witnesses, Ciotto and Bertano, and he encloses copies of three books by Bruno as well as of a small work (*opereta*).[2]

Second denunciation—perhaps prompted by his confessor—25 May 1592. Mocenigo tells of a conversation which he had with Bruno who said that he did not fear the Inquisition because he did not remember having said anything evil, or if he had done so he had said it only to Mocenigo.[3] On the 25th of May the denunciation is presented by the Padre Inquisitore to the Holy Office, as it was called.

Then, as was the practice, some witnesses who were carefully concealed from the prisoner were called, in this instance, the two booksellers mentioned by Mocenigo

[1] Limborch, p. 282. [2] Berti, p. 327. [3] Ibid., p. 329.

who had met Bruno at Frankfort. They had little to say for or against him, except that one said that the prior of the Carmelite monastery at Frankfort, where Bruno lodged, had remarked that Bruno was a man without religion. Then came, also after the manner of this tribunal, a long series of examinations of the prisoner, designed to build up a case against him; examinations so frequent, so protracted, so searching, that, even if torture were not employed, the prisoner's nerves generally gave out, and his resistance to his prosecutors broke down. The materials for proving guilt were, so to speak, slowly squeezed out of the accused.

On the 29th May 1592 Bruno is brought before the court and is examined. In the official note of the proceedings his appearance is thus described: [1] 'quidam vir, comunis staturae, cum barba castanea, aetatis et aspectu annorum quadraginta circiter.' He is questioned minutely as to his life and as to the circumstances in which he came to Venice.

On the same day a fresh denunciation against him by Mocenigo is lodged; he deposes to further heresies to which Bruno has given utterance; it looks as if he were being pushed on by some one in the background.[2]

On the following day (30 May 1592) Bruno is further examined. He tells his life in more detail and states where he had been and what books he had written. He admits that in some of his works he has spoken and discoursed 'too philosophically and disingenuously, and not enough as a good Christian would'.[3] Shortly afterwards (2 June 1592) comes a further searching cross-examination as to his books and doctrines, of which the Inquisitors now know more. He is pressed hard and has to make grave

[1] Berti, p. 339. [2] Ibid., p. 342. [3] Ibid., p. 349.

admissions.[1] But 'I have neither spoken nor written those things *ex professo* nor for the purpose of directly impugning the Catholic faith, but basing my arguments solely on philosophic reasoning or reciting the opinions of heretics.' [2]

The same day he is also examined in prison—which was a usual practice—as to the incarnation, transubstantiation, transmigration. He admits that he had spoken with levity of certain moral offences.

3 June 1592. Again a further examination as to many points of doctrine, as to his living in heretical countries and consorting with heretics, as to his opinions respecting the creation of the world, as to praising Queen Elizabeth and other heretic princes. He admits much against himself. 'I have praised many heretics, and also heretic princes, but I have not praised them as heretics, but solely for the moral virtues they possess, nor have I ever praised them as religious and pious persons.' [3]

4 June 1592. The tribunal which probably so far had little knowledge of his writings, has now got a copy of his book, *de Sigillis Hermetis et Ptolomei*.[4]

23 June 1592. His examination is briefly interrupted to call Morosini, the historian, who states that he had never heard Bruno say anything contrary to faith. Ciotto is also recalled and speaks to the same effect.

I will not go through all the examinations so many and so protracted as to crush or depress the most buoyant spirit. I pass to the final examination (30 July 1592). The demeanour of the accused, hitherto bold, almost aggressive, has changed. Whether it is that he now recognizes his peril, or that he has been broken down by

[1] Ibid., pp. 257–9.
[2] Ibid., p. 357.
[3] Ibid., p. 373.
[4] Ibid., p. 378.

the horrors of imprisonment or the repeated examinations, he no longer speaks with confidence. He confesses his faults. 'I acknowledge that I have given no small occasion for suspicion of heresy, yet even so I assert that it is the truth that I have always been conscience-stricken and intended to reform.'[1] He humbly begs pardon for his many offences. The official account is as follows:

'Humbly beseeching pardon from the Lord God and Your Most Illustrious Lordships for all the sins I have committed, I am here ready to perform whatever shall be decided by your wisdom and shall be adjudged expedient for my soul.'[2]

'And furthermore I pray that you will give me a punishment severe to excess, if so be I might avoid a public exhibition which might bring disgrace on the sacred habit of the Order, which I have worn; and if by the mercy of God and Your Most Illustrious Lordships my life shall be spared, I vow so notably to reform my life that the edification of my new estate may purge the scandal which I have occasioned.'[3]

It has been urged in excuse for this abasement and abandonment of principles that he had never worked them out systematically, that he was so accustomed to deal in symbols that he could with consistency entertain opposing doctrines.[4]

Need we seek for excuse for abandonment or concealment of convictions? Shall we blame him greatly if aware what might befall him he first equivocates and then yields, even as Savonarola had for a time done. It was not the least evil of this system that it encouraged duplicity or economy as to truth. There was a whole science of equivocation and subterfuge. The investigator in any region, if prudent, must speak guardedly; he must state as a hypothesis what he believed to be a fact; he must

[1] Berti, p. 382.
[2] Ibid., p. 384.
[3] Ibid., pp. 384–5.
[4] Chr. Sigwart, *Kleine Schriften*, i. 106.

have two measures of truth ; and he must try to persuade his vigilant censors that he had one set of beliefs as a philosopher and another as a theologian. The words which I have quoted were Bruno's last authentic words.[1] What is known of him afterwards is only indirect and unofficial. For a time there was silence ; the court stopped its deliberations, for what reason is unknown. It is possible that his petition for pardon would have been granted on the terms which he suggested but for the intervention of the Roman Court. On the 17th September 1592 was sent a request by the Sacred Congregation at Rome, asking for him to be sent to Ancona, thence to be conveyed to Rome, there to be dealt with. On the 28th of September the matter is put before the Venetian Senate. It was in no hurry to comply with this request, which touched one of the prerogatives of the State.

There was much correspondence on the subject, the Papal Nuncio urging the point that Bruno was not a subject of the Republic and that he was already in contumacy with respect to two suits instituted against him in Naples and Rome. 'The Nuncio replied that he was a Neapolitan and not a subject of this state ; and that he was first prosecuted at Naples and then at Rome for the aforesaid grievous crimes.'[2] And here I come to a mystery which Bruno's many biographers have not noticed, far less explained. Sarpi, the famous champion of the Republic against the Papacy, wrote a book on the history of the Inquisition in Venice, and one point which he urges with force is that the Inquisition was wholly independent of the Roman Court and derived its authority from the Republic. In that volume he also discusses the question of extradition, and, while admitting that

[1] Berti, p. 264. [2] Ibid., p. 391.

the general rule is that an offender shall be handed over to be tried where his offence was committed, he contends that there is an exception as to heresy 'because the heretic sins against God, who is everywhere; and again, because so long as he clings to his error he sins everywhere he goes: and so, wherever he is punished, he may be said to suffer in the place where he has offended.'[1] Why the Republic did not insist upon this, I cannot say.

In the end the Republic agreed to surrender him. He was delivered over to the Papal officials. From that time he disappears from view. We know little more than that he remained in prison from the 27th February 1593 to 1599. What happened in these six years, why there was this long delay, no one can now tell—no one will ever tell—the records appear to have been lost or destroyed. Was he forgotten? Did the Pope long hesitate as to his fate? Was he treated with exceptional favour as a Dominican? Was he subjected to fresh interrogation? Did he cast aside all subterfuges and avow his true opinions? Was he tortured? We cannot say. It is a great mystery.[2] He vanished in darkness. He emerges only to go to the stake. We do not even know with certainty the grounds of his condemnation by the Roman Court. All that we know is to be gathered from an account, imperfect and inaccurate in some respects, by Scioppius, a German scholar who happened to be in Rome in 1600, the year of the jubilee of Clement VIII. I translate his account, so far as it relates to the incidents at Rome. 'There he was interrogated several times by the Holy Office and convicted (*convictus*) by the chief theologians. At one time he obtained forty days in which

[1] Sarpi, p. 76; Matthaeus, *de Criminibus*, ch. ii, sect. 8.

[2] Berti, pp. 275–9.

to consider his position (*quibus deliberaret*); by and by he promised to recant; then he renewed his follies (*nugas*); then he got forty other days for deliberation. But he did nothing except to baffle the Pope and the Inquisition. After having been about two years in the custody of the Inquisitor, he was taken on February 9 to the palace of the Grand Inquisitor. In the presence of illustrious cardinals of the Holy Office (who surpass all others in age, experience, knowledge of affairs and of law and theology), in the presence of the expert Assessors and the Governor of the City, Bruno was brought into the hall of the Inquisition and heard his sentence on bended knees. The sentence narrated his life, his studies, his teaching, the fraternal care which had been taken to induce him to repent and his obstinate refusal; he was then degraded, excommunicated and handed over to the secular power with the request that he should be punished as mercifully as possible and—these were the words by which death by fire was designated—"without effusion of blood." This ceremony over, he answered with threatening air, "Perhaps you, my judges, pronounce this sentence against me with greater fear than I receive it." The guards of the Governor conducted him to the prison; he was left there eight days to see whether he would repent. But it was no use. So lastly he was taken to the stake. Just as he was dying a crucifix was presented to him, but he pushed it away with fierce scorn. So he was burnt and perished miserably.'[1] One recalls the prophetic words: 'I have fought; that is much—Victory is in the hands of fate. Be that as it may with me, this at least future ages will not deny of me—be the victor who may—that I did not fear to die, yielded to none of my

[1] Ibid., p. 400.

fellows in constancy, and preferred a spirited death to a cowardly life.'[1]

It will be asked, Was he guilty? The answer cannot be given with confidence; we cannot be quite sure of the charges against him. But from the point of view of the lawyers of the time it is probable that he was guilty of heresy and apostasy; guilty of offences which in those days were capital; guilty in modern language of thinking freely; guilty of not being afraid to go into the light; guilty of seeing more clearly than other men the consequences of the great discoveries which had been made in his age, and pressing with ardour upon his contemporaries, especially as to the plurality of worlds, those consequences which later generations found embarrassing.[2]

But the truth is borne in upon the legal historian that considerations of guilt or justice are here somewhat beside the question. Those concerned had other things in view. One does not think or talk of guilt or justice when one is staying a plague or pestilence, or arresting a devastating flood. One does what is effectual. And in the times of which I speak there was, men thought, the deadliest of pestilences and plagues to be stayed, the most destructive of floods, overturning all settled order, to be arrested. The fact is that the word 'trial' by which, or its equivalent, we now describe legal proceedings, is somewhat modern and misleading. It imports unprejudiced search, hearing of both sides, balancing of conflicting evidence and a final decision based thereon. There was a great advance, and it was a late one, when, order being safe, men could afford to think of justice. It has been urged that it was the merit of Roman law to make that advance:

[1] MacIntyre, p. 99.

[2] J. Ward, *The Realm of Ends*, p. 181.

'Tandis que le droit romain, et après lui les canons de l'Eglise, proclamaient ce grand et salutaire principe—Quiconque n'a pas avoué son crime ou n'en a pas été convaincu par des preuves éclatantes et irréfutables doit être tenu pour innocent—les coutumes germaniques partaient du principe contraire. C'est l'accusé qui dans le droit barbare est tenu de faire la preuve de son innocence', by purgation or otherwise.[1]

In some of the oldest words describing legal procedure is embedded, if I mistake not, a wholly different conception. What seems to us of the essence of legal procedure is either absent or seems a mere accident. We come to a time when the main business of courts is to begin very near the point where they now end; not the examination of the truth of a controversy submitted to it, but the pronouncement of an opinion, the assertion of power, the exercise of an administrative act. Professor Thayer, in his book on Evidence, has pointed out that the word 'trial' in the sense in which it is used with us, is comparatively modern; and undoubtedly many of the older expressions descriptive of legal procedure are suggestive of enunciation of a predetermined result rather than of an inquiry.

'As applied to the old law this word (trial) is an anachronism. The old phrases were *probatio*, *purgatio*, *defensio*; seldom, if ever, in the earlier period, *triatio*. In those days people 'tried' their own issues; and even after the jury came in, e. g. in the early part of the thirteenth century, one is sometimes said to clear himself (*purgare se*) by a jury; just as a man used to be said in our colonies to "clear himself" and "acquit himself" by his own oath, as against some accusations and testimony of an Indian.'[2]

I make one qualification. Some of the very oldest forms of procedure are permeated by a higher sense of justice.

[1] Fournier, p. 263.

[2] J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law*, p. 16 *n*.

In the laws of Manu there is a chapter (ch. viii) devoted to judicature and the judicial duties of rulers. Nothing can be better or wiser than some of the maxims, the spirit of which is expressed in such words as these :

'The only firm friend, who follows men even after death, is justice : all others are extinct with the body.' [1] 'Where justice is destroyed by iniquity, and truth by false evidence, the judges who basely look on without giving redress shall also be destroyed.' [2] 'Justice, being destroyed, will destroy ; being preserved, will preserve ; it must never, therefore, be violated. "Beware, O Judge, lest justice, being overturned, overturn both us and thyself."' [3] 'As a hunter traces the lair of a wounded beast by the drops of blood, thus let a king investigate the true point of justice by deliberate argument.' [4]

But such conceptions of the functions of a court were in early times rare. Justice is a plant of slow growth.

It may seem strange that I should liken the ways and dealings of courts in primitive times to those of a court sitting in the centre of civilization composed of men of culture, at its head an enlightened Pope, and upon it one of the greatest scholars of his age, or indeed of any age, Cardinal Bellarmine. But—and it is one of the chief lessons to be derived from these studies—fear brings back the primitive conception of the functions of courts ; not necessarily, or indeed often, personal fear, but fear of changes ; fear on the part of the upholders of the old order ; fear of the effects of the discoveries of new truths ; fear of emerging into the full light. Where such fear is justice cannot be ; a court becomes an instrument of power ; judges are soldiers putting down rebellion ; a so-called trial is a punitive expedition or a ceremonial execution—its victim a Bruno, a Galileo, or a Dreyfus.

[1] Sir William Jones's translation, ch. viii. 17.

[2] Ibid., p. 14. [3] Ibid., p. 15. [4] Ibid., p. 44.

V. MARY QUEEN OF SCOTS

SO far I have chosen leading cases in the history of procedure from foreign countries. I turn now to some English trials illustrative of the growth of procedure here. I take my next examples from times long before our present legal methods were fully developed and fixed. The field of choice is embarrassingly large. I might have chosen examples of trials for heresy, or some of the trials for treason not less numerous, or I might have taken some case from the Year Books, the series of which ends about 1535; the objection to the latter being that these reports tell one so little; they are confined as a rule to bare outlines of the facts, some particulars as to pleadings and the like. Not without doubts and misgivings I have chosen the trial of Mary, Queen of Scots, in 1586; a subject of heated controversy, one as to which I do not suppose that there will ever be agreement, partly, no doubt, owing to the small amount of evidence bearing on her guilt and the suspicions attaching to some of the documents, but partly also owing to influences which still disturb the judgements of many persons. To-day, when she has been buried for fully three centuries, she has still her devout thoroughgoing partisans and her implacable enemies. She still bewitches some historians even as she bewitched young Douglas and Roland Graham and Babington, and repels others even as she offended Knox and Buchanan. I have come upon a whole literature, saturated with prejudice, much of it the production of men who would cleanse her name from evil repute in the same spirit as that animating those who

sought to rescue her from Loch Leven, Bolton Castle, Chartley, and Fotheringay. They cannot now risk their lives in her service; they heroically hurl themselves against evidence not to their mind. For them her cause is never lost. And of the unforgiving enemies whom she had in her lifetime, the Paulets, the Burghleys, the Mortons, the Knoxes, and Buchanans, there are the counterparts in present days; to name one of them, a brilliant historian who, with the magic of his style, can resuscitate everything in the past except facts not to his liking, whose sympathies go out copiously and ungrudgingly to all who are successful, and who industriously blackens her character and with cunning mockery derides her last hours. It fell to me to know two close students of her life; the late Dr. John Hill Burton and the late Mr. John Hosack. The former had a repugnance to her character which affected his judgement of events relating to her. He approached every problem with a prejudice against her. The latter was filled with enthusiasm and pity, moods also disturbing the judgement. I cannot doubt that if he had lived in those days he would have fought or plotted for her release and gone the way of so many heroic souls. Debarred from that service, he was quick to discern all that told in her favour and was scarcely fair to facts of another complexion. All that I can do in these circumstances is to endeavour to keep clear of side issues, to look at the facts as I find them, at the trial of the whole matter as an incident in legal history.

I anticipate one criticism of the selection of this trial. It may be said that the circumstances were altogether exceptional and that the choice is therefore unfortunate. I admit that the trial has unique features. But the proceedings illustrate the way in which so-called

justice was then administered, the strange and loose ideas as to evidence then prevalent, the readiness with which in an age of legal formalism forms were disregarded if the Crown required release from them. They show, too, in a striking manner, if I mistake not, what happens when legal forms are disregarded and when the Courts become the instruments of politicians. It will be for all time the type of the political trial—a crime more or less draped in legal forms; legal proceedings used to accomplish a political object; Machiavellianism applied to law.

Let me make it clear that it is solely with her trial at Fotheringay that I am concerned, so I abstain from touching upon many stirring and controverted episodes and mysteries in her life, for example, the authenticity of the Casket letters and her share, if any, in the murder of Darnley; still less am I concerned with her character and general conduct. I deal only with her trial, and even as to it I have nothing to say as to some matters which are of interest to the historian.

One further word of preface. The books written in or with reference to that time assume the existence of a regular course of legal procedure; such works as Smith's *De Republica Anglorum* (1583) and Fortescue's *De Laudibus Legum Angliae* (1463–70) assume settled practices which the reports so far as they exist do not disclose. The reality was probably different. Let me mention a characteristic fact. Smith makes a great point that torture was unknown to English law, the spirit of which did not permit it. In point of fact he himself sanctioned its use. The reality was very different.

It was a time of transition. The practice of the courts was still unsettled. There were no fixed rules as to

evidence in courts, either civil or criminal. The Court of Chancery had taken over the methods of procedure in use in the ecclesiastical courts abroad. The substantive law of equity may not have been in the main or to any great extent derived either from Roman or Canon law. That is the view of Maitland, who remarks that ' with the idea of law of nature in their minds they decided cases without much reference to any written authority, now making use of some analogy drawn from the common law, and now of some great maxim of jurisprudence which they have borrowed from the canonists or the civilians '.[1] This, however, is quite consistent with borrowing freely from the ecclesiastical law of procedure, with which the early Chancellors, who were churchmen, were familiar. The procedure in the Admiralty Court was borrowed from the same source. The ordinary courts fluctuated in their practices as to fundamental matters. The judges might talk of trial *per legem terrae*; they were not very certain what it was.

One more preliminary word as to the time and circumstances of the trial. Mary had taken refuge in England and had been there received, she alleged, under promise of courtesy and hospitality. Whether it was a breach of that promise to keep her in restraint for eighteen or nineteen years—the longest period for which, so far as I know, one sovereign has been imprisoned by another—is immaterial. It was a time of plots and counterplots; plots to overthrow Elizabeth; plots which Philip favoured; plots with which Mary, no doubt, sympathized. It was a time, too, when statesmen were not scrupulous as to ways or means of attaining great political ends. Some of them freely used forgery. They did not stop at assassina-

[1] F. W. Maitland, *Equity*, p. 9.

tion. No doubt many thought 'Vita Elizabethae mors Mariae: vita Mariae mors Elizabethae', and there was no hesitation to act accordingly, there were partisans of either who would not hesitate to make use of any weapon when political or dynastic interests were at stake.

We shall not understand the trial rightly if we do not realize the fact that it was a substitute, reluctantly accepted by some, for poison quietly administered. 'To Protestant England the Queen of Scots was a menace of civil war and ruin . . . Death was believed to be the only prison that would hold her.' To make away with her who was the occasion, if not the cause, of ceaseless unrest and peril to the realm, as it seemed, was, in the language of a modern historian, 'the political wisdom of a critical and difficult act'.[2] Poison naturally suggested itself to some of the professors of the *realpolitik* of the time. Camden writing in Latin the annals of the reign of Elizabeth, and imitating the style of Tacitus, states facts which recall some of the crimes described by the Roman historian of the reign of Nero—e.g. the murder of Agrippina.

According to Camden,[3] Leicester suggested that she should be poisoned, Morton that she should be sent back to Scotland and put to death on the confines of both countries.[4] For various reasons the semblance of a trial

[1] J. A. Froude, *History of England from the fall of Wolsey to the death of Elizabeth*, xii. 293; *Bardon Papers* (ed. Conyers Read), pp. 16, 17: 'She is the onely instrument to worke the overthrowe of religion in this whole iland' (p. 19).

[2] Froude, p. 342.

[3] W. Camden, *The Historie of the most renowned and victorious princesse Elizabeth, &c.* (Norton's translation, 1630), p. 81.

[4] But it seems that the idea of transferring Mary to Scotland 'to be dealt with' originated with Elizabeth. *Bardon Papers*, p. 16 *n.*; Killigrew Correspondence.

was deemed more prudent. But when the death sentence was obtained from a subservient Court, and when it became necessary to consider how to get rid of Mary and at the same time shield Elizabeth from the odium of signing the death warrant, poison again recommended itself to Elizabeth; she pressed the expedient upon her advisers and they, in their turn, pressed it upon Paulet, Mary's jailer.

All this was in perfect keeping with the statecraft of the age. Not long before the time with which we are concerned there had been going on in Spain a trial which drew upon it the attention of all Europe—I mean the trial of Antonio Perez, the secretary of Philip II; and one is struck with the many points of substantial resemblance, amid differences in detail, between the trial of the Queen of Scots and that of the secretary of Philip.

Let me quote the words of Diego de Chaves, confessor to Philip II, with reference to the death of Escovedo, murdered by order of Philip or with his approval:

'According to my opinion of the laws, the secular prince, who has power over the life of his subordinates or his subjects, in the same manner that he can take that life from them for a just cause and by formal judgement, so he can also do it without all that, since the additions of forms and all the customs of a suit are not as laws to him, who can dispense with them. For the same reason there is no blame to be attached to a subject who by his sovereign's order has put to death another subject. It must be assumed that the prince has given this order for a just cause, as the law assumes that there is always such in all the actions of the sovereign.'[1]

These words, it is true, were spoken of a Spanish sovereign. But they expressed what was then a pretty general belief. If some of the casuists of these times said

[1] F. A. M. Mignet, *Antonio Perez et Philippe II*, ch. ii.

that killing heretic prisoners was no murder, the casuists of both sides maintained that killing a dangerous subject was no murder. To the complaints as to the tyrannical doctrines of Mariana preached in Spain there was the answer, 'the evil doctrine, which they falsely charged against the Jesuits, did in truth govern the counsels of Elizabethan statesmen.'[1]

Even the high-minded Sarpi could in presence of the practical politics of his age write:

'In cases of incorrigible acts punishment ought to be secret, that there be no defilement of Patrician blood. . . . Poison ought to be the only method of removing such persons from the world, when it is not practical for justice to make them pass under the executioner's axe.'[2]

It was the age when Machiavellianism was dominant as never before or since,[3] and the trial is a standing illustration of the policy.

Now briefly as to the facts of the trial. On the 25th of September 1586 the Queen, who had been removed from Chartley, became a prisoner in Fotheringay. Sir Ralph Sadler, in whose custody she had been, had incurred displeasure by treating her with courtesy. Her new jailer, Sir Amias Paulet, a fanatical Puritan, seems to have had a personal dislike to her; a repugnance which, as has been said, 'scarcely ceased with her death'.[4] He was rude and overbearing, and bent upon extorting admissions from her. He had traits which recall Sir Hudson Lowe, the jailer of Napoleon. Twice has England had as prisoner a sovereign in her power. On neither occasion

[1] *The Letter-books of Sir A. Paulet*, preface by Morris, p. xxii.

[2] Quoted by Lord Acton, *History of Freedom*, p. 213.

[3] Ibid., pp. 213 ff.

[4] Allan J. Crosby and John Bruce, *Accounts and Papers relating to Mary Queen of Scots* (Camden Society Publications, 1867), p. iii.

has the conduct towards such prisoner been altogether creditable. But if Sir Hudson Lowe was indiscreetly frugal towards Napoleon (and Paulet longed for Mary's death partly on the ground of economy), he was not a spy or a boor, and he did not seek to ensnare his captive into admissions which would be used to justify his execution. He did unpleasant work in an honest if tactless fashion. That cannot be said, except with some reservation, of Paulet. I should not have adverted to this personal matter but for the fact that it may be of moment when we come to consider the so-called evidence and the trial and the conduct of the prosecution.

There had been plot after plot to kill or dethrone Elizabeth; the latest, the Parry plot, was one of many. The situation in 1585 was grave; there was widespread alarm; dread of invasion; anxiety lest Elizabeth's rule should be overthrown and she herself killed; fear of Spain; fears as to Mary and her friends.

There was not the atmosphere necessary for a fair trial. There were no settled rules of evidence. There were no impartial juries. Those who did not do the bidding of the Crown were in peril, they might be punished. The Judges had no fixed tenure. They might be dismissed just as might a menial servant if they did not do what was expected of them by the Crown. Even if Mary had been brought before the ordinary tribunals of the country —and I shall call attention to the extraordinary nature of the actual tribunal which condemned her—acquittal was impossible.

In these circumstances there had been formed the famous Association of men who bound themselves to defend Elizabeth and to prosecute, suppress, and withstand her enemies. This Association was formally recog-

nized by the 27 Elizabeth, Cap. 1 (1585), which enacted that:

'if anything be compassed or imagined, tending to the hurt of her majesty's royal person, by any person, or with the privity of any person that shall or may pretend title to the crown of this realm: that then by her majesty's commission under her great seal, the lords and other of her highness's privy council, and such other lords of parliament to be named by her majesty, as with the said privy council shall come up to the number of four and twenty at the least, having with them for their assistance in that behalf such of the judges of the Courts of Record at Westminster as her highness shall for that purpose assign and appoint, or the more part of the same council, lords and judges, shall by virtue of this act have authority to examine all and every the offences aforesaid, and all circumstances thereof, and thereupon to give sentence or judgement as upon good proof of the matter shall appear unto them.'[1]

This was a statute purposely aimed at the Queen of Scots, giving power to create a tribunal, so far as I am aware, unknown before, to proceed to make inquiries and to pass sentence in ways also unknown; a *privilegium* in the worst sense.

And now as to the tribunal created under it, and in virtue of a commission issued the following year (1586). It was addressed to the Archbishop of Canterbury, the Chancellor, the Lord Treasurer, the Great Chamberlain, to various lords of Parliament and to various members of the Privy Council, in all forty-six in number, to 'examine all and singular matters compassed and imagined, tending to the hurt of our royal person as well as by the aforesaid Mary', and to 'give Sentence'.[2] It was a frequent device to create a special commission, consisting of selected officers and judges; a method not well calcu-

[1] 1 *State Trials*, 1163. [2] Ibid., 1166.

lated to secure an impartial tribunal. But I am not aware of any commission so manifestly constituting a packed court. This commission did not include some of the most eminent men of the time, e. g. Raleigh. It included many high officers of State, most of them intimately connected with Elizabeth. It included one commissioner who had been engaged in a conspiracy and as to whom it is scarcely too much to say that his good conduct was the price of his safety.[1] Impartiality was out of the question. The commissioners for the most part were politicians engaged for an unpleasant job. Elizabeth saw that there were good reasons for not trusting to the ordinary tribunals, as she explained in her speech to Parliament:

'You lawyers are so curious in scanning the nice points of the law, and following of precedents and forms, rather than expounding the laws themselves, that by exact observing of your forms, she must have been indicted in Staffordshire, and have holden up her hand at the bar, and have been tried by a jury of twelve men. A proper course forsooth of trial against a princess! To avoid, therefore, such absurdities, I thought it better to refer the examination of so weighty a cause to a good number of the noblest personages of the land, and the judges of the realm; and all little enough. For we princesses are set as it were upon stages, in the sight and view of all the world. The least spot is soon spied in our garments, a blemish quickly noted in our doing.'[2]

Like Mr. Froude she had no liking for 'legal forms' and 'nice points of law', which stood between her and her designs.

Why should she?—she who was writing to Paulet 'let the wicked murderess know how her vile deserts compel these orders'; who between the 1st and 14th of October

[1] R. de Chantelauze, *Marie Stuart, son Procès et Exécution*, p. 194.

[2] 1 *State Trials*, 1193.

is writing to the commissioners 'upon the examination and trial of the cause, you shall by verdict find the said Queen guilty of the crime wherewith she standeth charged'.[1] To her Mary's guilt was clear. In her mind the inquiry was over before it had well begun.

Next as to the charges against Mary.[2] Had she been indicted under the statute of Edward III as to high treason[3] these would have been clearly specified. She would have been charged with one or both of two things: (1) compassing or imagining the death of the King, the Queen, the eldest son or heir; (2) levying war against the King; and the overt acts relied upon would have been mentioned. In this strange semblance of a trial there was no precise charge. The commission had a roving mandate to find her guilty of any crime and pronounce upon her any sentence. In fact, Burghley in his cross-examination and in many assertions or accusations during the proceedings rambled over matters unconnected with the charge of privity to a plot to murder. For taking this course and avoiding a trial at Common Law the advisers of Elizabeth had doubtless good reasons. They eluded certain inconveniences; they might do as they liked without regard to exact observance of forms. The finding of the commission was as follows: 'that divers matters have been compassed and imagined within this realm of England, by Anthony Babington and others, *cum scientia*, in English, with the privity, of the said Mary, pretending title to the crown of this realm of England, tending to the hurt, death and destruction of the royal

[1] S. Cowan, *The Last Days of Mary Stuart*, p. 64.

[2] There had been formulated a series of charges in a petition presented by Parliament to Elizabeth in 1572 (*Bardon Papers*, p. 1).

[3] 25 Ed. III, Stat. 5, c. 2.

person of our said lady the queen.'[1] One commissioner alone had the courage to say the case was not proved.

Such was the finding of the commission; and now as to the evidence supporting it. In 1586 there was no doubt a formidable conspiracy against Elizabeth. Babington, Ballard, and others had planned an insurrection to overthrow her and place Mary on the throne. They were prepared to go to all lengths. Some of these, says Camden,[2] who took part in it 'persuaded themselves and others, which hunted after the glory of martyrdom, that it was meritorious to take away the lives of Princes excommunicated.' They contemplated the death of Elizabeth; it was no doubt part of Babington's plan. That Mary knew of the existence of designs against Elizabeth's rule is also clear. To mention one piece of evidence out of many—there is extant a letter from her with respect to the Prince of Parma in which she says: 'so, in as moch as I can for mine owne part, I shall alwayes esteme it for me no small happinesse to concurre in an action so important for the weale and common quietnesse of all Christendome'.[3] At the trial, if I may use that expression with respect to that which lacked the essentials of a trial, she owned as much. In the course of the proceedings she said with pride: 'I am accused of having written to Christian princes in the interest of my freedom. I confess I have done so and I should do so again. What human creature of God would not do the same to escape from a captivity such as mine?'

The accusation adopted in the sentence is that she was privy to and concerned in Babington's conspiracy or

[1] 1 *State Trials*, 1189. [2] Camden, p. 73.

[3] Prince A. Labanoff, *Lettres, instructions et mémoires de Marie Stuart*, vi. 336; J. Hosack, *Mary Queen of Scots and her Accusers* (2nd ed.), ii. 332.

in the project for killing the Queen. What evidence was there of either charge? According to the rules of evidence as applied in English courts to-day, none. According to good sense, as it seems to me, none. No witnesses were called either for or against her. The overt acts put forward against her were four letters, two by Babington to Mary, and two by her to Babington; and these letters, together with admissions by Babington, Ballard, Savage and other conspirators, and by Nau and Curle, Mary's secretaries, were relied upon.

The first of the four letters was one to Babington from Mary in which, referring to certain packets for her, Mary says: 'I pray yow, if anye be come to your handes, and be yet in place, to delyver them to the bearer hereof, who will make them be safelye convayed vnto me.'[1] The next was a letter, undated, from Babington to Mary in which he told her of an intended invasion unmistakable in its meaning:

'My *selfe with ten gentilmen and* a hundred our fellowes will vndertake the deliverie of your roiall person from the handes of your enemies. *For the* dispatche of the vsurper, *from the obedience of whom* (*by the excommunication of her*) we are made free, there bee sixe nobil gentilmen, all my private frendes, who for the zeale they beare to the Catholique cause and your Majesties service will vndertake that tragicall execution.'[2]

The next letter, 17 July 1586, is an answer to Babington's, in which certain points are mentioned essential for the success of the invasion, and also for ensuring her escape. The postscript is 'Fayle not to burne this present quicklye'.[3]

[1] 25 June 1586; *Bardon Papers*, p. 28. [2] Ibid., p. 31.

[3] Ibid., p. 40. Of course if these letters were genuine—certainly if the letter of 17 July 1586 was so—the case was conclusive.

The admissions used against her were confessions said to have been made by Babington, Savage, and Ballard and by her two secretaries. I take separately each of these heads of evidence. Now first as to the letters. The originals were not produced at Fotheringay, though the prisoner strenuously and repeatedly asked for them. Nor were, so far as I can make out, the first copies produced. Nor is it certain that such copies were forthcoming on the trials of Babington and the other conspirators. Nor was the person called who made the copies, nor the person who deciphered the originals. The story as told by Camden as to the interception of the correspondence is this: Walsingham kept in his pay a number of spies, Catholic and Protestant; one amongst them, Gifford, a traitor to the cause which he professed to serve, by means of another traitor bribed a certain brewer (the go-between),

'who put in the letters privily and received another through an hole in the wall, which was stopped with a loose stone, which letters always came to Walsingham's hands by messengers laid of purpose to carry them. Walsingham opened them, wrote them out, found out the privy ciphers by the singular skill of Thomas Philips and by the cunning of Arthur Gregory sealed them up again in such sort, that no man could judge they had been opened, and sent them to those to whom they were directed by the superscriptions.' [1]

Another account is that the correspondence was conducted by means of a barrel of beer with a false bottom in which were put the letters.[2]

Either version of the story accounts for the non-production of the originals of her letters to Babington; they were forwarded to him after being tampered with. But, seeing that her papers were seized, they do not

[1] Camden, p. 77. [2] Labanoff, vi. 284.

account for the non-production of his letters to her. The story furnishes no explanation of the non-production of Philips, who deciphered them, or of the copyist. In a sense everything turned upon the truthfulness of Philips, a man who, as Mr. Morris says, 'had spent his life in counterfeiting.'[1] A word or two interpolated might convert Mary's letters from a natural approval of the plans for her own release into an approval of the design to murder her cousin.

Of no less importance was the presence of Curle, who it was alleged had written them. He was in London. He might have been called. He was not. Remember that Mary strenuously challenged the authenticity of the letter alleged to be hers.

The second head of so-called evidence consisted of alleged admissions and confessions as to these letters by Babington and other conspirators, and by Curle and Nau, the secretaries. The two secretaries were, as I have stated, in London, but were not called, though Mary demanded that they should be. Her worst enemies will own that she was not a fool—many would admit that she had great sagacity. She knew that her secretaries had been examined and was told that their evidence was against her. It was not courage—it was madness and folly—to run the risk of their being brought before her and saying 'We wrote two of these letters from your notes or at your dictation. You received the others.'

We have the so-called confession of Curle. It is so loosely worded as to prove little or nothing: 'Telle ou semblable me semble avoir esté la response escript en Francoys par M. Nau laquelle j'ay produit et mis en chiffre comme j'en fais mention au pied d'une copie de

[1] Paulet, p. 116.

la lettre de M. Babington laquelle M. Nau a signé le premier.' Nau's admission is equally vague and non-committal: 'Je pense de vray que c'est la lettre escript par sa majesté à Babington comme il me souvient.' The terms of the so-called admissions are compatible with letters with or without the incriminating sentences. Camden cautiously says of the admissions:

'Whether these Secretaries were drawn hereunto by corruption, I cannot say: Yet this is certain by letters, that when Curle at this time claimed promise of Walsingham, Walsingham taxed him as unmindful of extraordinary favour, as who had confessed nothing but what he could not deny, Nau his fellow urging it to his face.'[1]

In other words, he might have been treated as was Babington, being tortured and in the end drawn and quartered. Further as to the admissions of the conspirators, it is remembered that they might have been confronted with her. Babington's trial was on the 13th and 14th September 1586. Her trial began on the 14th of October. He was executed on the 20th of September. But his death might have been postponed; he might have been called. He was not. 'You lay to my charge,' she said, 'my letters to Babington. Well, be it so. I deny them not; only show me a single word in them about Elizabeth and then I shall allow your right to prosecute me.' The challenge was not met. I lay no great stress upon the fact that Nau in the following reign, when he could speak more freely, denied that he had said anything implicating Mary.[2] I do not seek to overstate this weak side of the prosecution. In not confronting the accused with those who made confessions there was ample precedent in the practice of the Inquisition which

[1] Camden, p. 81.

[2] C. Nau, *History of Mary Stuart* (ed. J. Stevenson), p. lii.

the courts in England then followed when it suited their purpose. I merely point out that the best evidence was available and that it was deliberately, and, I may assume for good reason, not used.

I say little as to the internal arguments against the authenticity of the letters. With much ingenuity Mr. Hosack endeavours to show which are the interpolated passages in Mary's letter and to point out the contradictions between such passages and the rest of the letters. It may be true that they are introduced 'in the most abrupt and startling manner, and have no connexion with the remaining portions of the letter'.[1]

It may also be true—and no one has put this more strongly than Mr. Froude—that the conspirators had every motive for concealing from Mary their design upon Elizabeth's life, and that the insertion of a clear, I might say, clumsy statement of their intentions was improbable. What was to be gained by this? How much was risked by it?[2] But my experience of courts of law is that such *a priori* reasoning about the tenour and contents of letters is untrustworthy. In genuine documents, as in the incidents of real life, there are often elements of the unexpected. To my mind more weighty is another argument based upon a consideration which will I believe appeal to every lawyer. You can generally surmise the strength of your opponent's case by the manner in which he develops it. It is with litigation as with whist: you do not know at the beginning of the game whether your opponents have good hands; as the game goes on, its character is revealed by their play. Now the impression left upon me by studying the conduct of the prosecution is that the prosecutors having a weak case

[1] Hosack, ii. 353, 362. [2] Froude, xii. 231.

were anxious to conceal it, and that they had to 'fish' for evidence. Every effort was made before the trial and during it to procure admissions to be used against Mary. Paulet interrogated her again and again, and tried to obtain admissions.[1] So did Sir Thomas Gorgas.[2] Elizabeth pressed her to answer by letter.[3] At the so-called trial Mary was examined at great length by Burghley and others. Why this long questioning? Why all these attempts to get admissions? Why all these efforts if the prosecutors had Nau and Curle and some half-dozen conspirators ready to confront her? The point was carefully thought over. There is a letter (7 October, Elizabeth to Burghley and Walsingham) in which they are invited to consider 'whether in case she desire to hear her servants, Nau, Curle, and Parker, personally to testify those things they have confessed against her, it shall be necessary to have them there, or to proceed otherwise without them'.[4] It is in evidence that the advisers of the Crown had to consider 'whether it shall be convenient to admit the accusers to maintain the accusation upon their voluntary oath, being partakers in the accusation being criminal'.[5]

I cannot doubt that it was for good reason that the prosecution did not call Nau, Curle, or others.

One word as to Mary. Her defence and whole demeanour were queenly, though Mr. Froude may sneer at it as acting. It is too the spectacle of a great intellect combating a host of astute politicians and lawyers eager to condemn and make away with her. Considering her situation, deprived of her papers and notes, no man daring, as she said, to step forward as her advocate, forced

[1] Chantelauze, p. 156. [2] Ibid., p. 139. [3] Ibid., p. 185.
[4] Cowan, p. 63. [5] Ibid., p. 35.

to meet unformulated charges, her conduct was superb, in dignity and ability matchless. It is not the Mary Stuart of Schiller or Swinburne. Both poets have put the proceedings and arguments in the hall at Fotheringay, the one into stately, the other into luscious verse, closely following the authentic narrative. But their verse, if I mistake not, has not the force and pathos and dignity of the story as told in Camden's prose or the notary's official account. Only Greek tragedy at its best can vie with it in concentrated power. It is not the Mary Stuart of either poet—it is a woman of affairs, a clear, powerful, keen intelligence, more than able to hold her own with the lawyers questioning and arguing with her, and with a wider outlook than they. She brushed aside the argument that being within the 'protection' of Elizabeth's laws, she was subject to them; having been always a prisoner 'she had enjoyed no protection of the laws of this land'. She rebuked her judges and bid them look unto their consciences and remember that the theatre of the world was wider than the realm of England.

Let us sum up the chief facts in the proceedings: a commission issued which virtually assumes her guilt; proposals to poison her; these not carried out; the substitution of the semblance of a trial before a court composed in the main of officers of State; no witnesses called against her; no precise charge formulated; refusal to assign her an advocate; refusal to let her have access to her papers; letters put in evidence against her but no evidence given of their authenticity; no proof of their actual delivery to her; confessions or admissions used without the production of the persons who made them, as she demanded; disregard of the provision of the 27th Elizabeth as to two witnesses. What is to be

said of it? Mr. Hosack speaks of it as the 'most disgraceful of all the judicial iniquities which disgrace the history of England'.[1] I am inclined to think he is right. Mr. Skelton, writing as a lawyer, remarks, 'It cannot indeed be truly said that Mary was even *tried*—all the forms and formalities which have been devised by jurists for the protection of the innocent having been studiously disregarded.'[2]

In my study of trials not to the credit of humanity I have met nothing worse. A packed court; no counsel; the judges prosecutors; the real accusers not brought forward; originals not produced; Babington's confession produced but not its maker. It was a jumble of legal systems; no evidence, no counsel, no jury.

The sentence had a fit sequel. It had been proposed to poison her in order to avoid the trouble of a trial and the odium attaching to Elizabeth by the execution of her cousin. Found guilty, it was still desirable to make away with her without casting on Elizabeth the responsibility. On the 1st February 1587 Walsingham and Davison consulting with Burghley in consequence of the pressure of Elizabeth, wrote to Sir Amyas Paulet, Mary's keeper, this letter:

'After our hearty commendations, we find by speech lately uttered by her Majesty that she doth note in you both a lack of that care and zeal of her service that she looketh for at your hands, in that you have not in all this time of yourselves (without other provocation) found out some way to shorten the life of that Queen, considering the great peril she is subject unto hourly, so long as the said Queen shall live. Wherein, besides a kind of lack of love towards her, she noteth greatly that you have not that care of your own particular safeties, or rather of the preservation of religion, and the public good and prosperity of your country, that

[1] Hosack, ii. 431.

[2] J. Skelton, *Mary Stuart*, p. 178.

reason and policy commandeth, especially having so good a warrant and ground for the satisfaction of your consciences towards God and the discharge of your credit and reputation towards the world, as the oath of association which you both have so solemnly taken and vowed, and especially the matter wherewith she standeth charged being so clearly and manifestly proved against her. And therefore, she taketh it most unkindly towards her, that men professing that love towards her that you do, should in any kind of sort, for lack of the discharge of your duties, cast the burthen upon her, knowing as you do her indisposition to shed blood, especially of one of that sex and quality, and so near to her in blood as the said Queen is.' [1]

It is just such a letter as might have been written to a bravo by Caesar Borgia or Philip II, though with a snivel or whine all its own.

But Paulet was not such. He had done dirty work and done it with zest. He was not prepared to be a poisoner. The next day he wrote with grief and bitterness of heart lamenting that:

'I am so unhappy to have liven to see this unhappy day, in the which I am required by direction from my most gracious sovereign to do an act which God and the law forbiddeth . . . God forbid that I should make so foul a shipwreck of my conscience, or leave so great a blot to my poor posterity, to shed blood without law or warrant.' [2]

In spite of his refusal she was desirous of 'a better and safer way of ending the matter', and one which would relieve her of responsibility.

Such is the story of the proceedings ending in her death. So let us not speak of it as a trial or, if we do so, only in a narrow sense. It was a measure of State policy. As such, it was successful. That is its justification. It had no other—at all events from the point of view of the

[1] Paulet, pp. 359–60. [2] Ibid., pp. 361–2.

lawyer. It did its work, though poison might have done it more quickly. As Mr. Froude says, it put an end for ever to a long struggle with dubious results. It recommended itself at the time to the statesmen who thought it good business to remove a troublesome adversary by assassination, and who derided her sufferings. Burghley made jokes over her execution. Mr. Froude chuckles over the grey hairs disclosed by the blows of the axe on the scaffold. It is, and it is likely to remain, the leading case of Machiavellianism in legal procedure—that form of *realpolitik* which includes coercing or packing juries, or framing a special tribunal to ensure conviction. Fouquier-Tinville would have approved of every step.

One more deduction from these proceedings. Legal forms and usages were signally disregarded. Elizabeth would have nothing to do with 'nice points of law and following of precedents and forms'. She had in regard to the crime of Babington and others urged the application of a more cruel punishment than the hideous tortures provided by the savage feudal law. Her plea was necessity. But, after all, these forms are the dykes and dams restraining outbursts of passion of monarchs and peoples, the channels dug by experience in which justice may flow in purity and freedom. Break these supports down and those who do so, or more often their successors, are swept away. By some surely working law the formless trials of Elizabeth's time are followed by the impeachment of Charles, the dubious justice of Louis XIV's tribunals by the Committee of Public Safety. So regarded their proceedings may have significance, if not for the present, for the future.

VI. GALILEO

I COME next to two trials which could not well be passed over even if they had no interest to the lawyer. They belong to the large group of trials of thinkers, explorers, discoverers, men of science, and, as such, they have interest other than legal interest; they are typical examples of this class. I refer to a number of trials, which occurred in the sixteenth, or early in the seventeenth, century. Their scenes are Italy and Switzerland; they include the trials of Galileo, Vanini, Campanella, Bruno, Servetus. They are important incidents in the struggle then going on between the old order and the new. Tempting though the many side issues connected with these trials are, I shall do as I have before done; I shall deal with them solely as incidents in legal history.

I have taken two trials, that of Galileo and that of Servetus. They were not exceptional. If you had travelled at the end of the sixteenth century or the beginning of the seventeenth from one country in Europe to another, wherever you went you would have found similar prosecutions on foot, similar attempts by courts secular or ecclesiastical to put down obnoxious novelties, and you would have found similar methods in use. And quite apart from outbursts of local fanaticism this was natural. Everywhere prevailed the doctrine *cuius regio eius religio*—the subject must be of the faith of his ruler. This was tempered in Germany by the *ius emigrationis*. The subject must quit if he does not conform. Such was the common law of Europe, enforced under the name of proceedings for high treason or heresy, but with the same

results. *Ure et seca* was the policy to be applied. The offenders might be scholars or inquirers with no desire except to seek the truth, they might be treated as poisoners or as thugs.

In Scotland there were trials for blasphemy not unlike those which the Inquisition directed. Torture, which the law of Scotland recognized, was freely used, and in a terrible form. In Pitcairn's wonderful collection of trials frequent mention is made of this hideous practice. Almost at the same time as Galileo's trial James Ogilvie was being tried for high treason; and it is remarked that:

'in the tryal of some criminal persons, it was found that nothing helped so much to find out the trueth of faults wherewith they were charged, than with-holding of their naturall rest; it was aduised, that he should be kept without sleepe for some nights, which was accordingly done':

the result being delirium.[1]

In England there were at this time similar trials, disguised, it might be, under the name of high treason, and in the Star Chamber and Privy Council torture was employed, if not in pursuance of the Common Law, in pursuance of the royal prerogative.[2] Had you gone to France you would have found the same hideous devices in use, the various Parliaments, or high courts, actually competing with each other in the discovery of more effectual modes of torturing the human frame; modes which I cannot portray, but which are described in the histories of criminal law and the instruments of which are still preserved.

There was a period of about 250 years—I cannot state

[1] R. Pitcairn, *Criminal Trials in Scotland*, 1488–1624, iii. 337.

[2] D. Jardine, *A Reading on the Use of Torture in the Criminal Law of England.*

it in exact figures—in which all that was evil and cruel in criminal law became prominent and perfected. I may call it the black belt of criminal law, when torture in many forms was remorselessly employed; when charges of witchcraft and the like were used to cover or palliate atrocities; when there was no pity for age or sex. If there were formed a collection or museum of the appliances of criminal law, its methods and punishments, it would be a strange and varied and grim spectacle. But it would, I think, appear that ingenuity was most active, cruelty most refined and triumphant, about the time with which we are concerned. At this period more than at any other the dark places of the earth were habitations of cruelty, and evil passions found an outlet in forms of justice.

I begin with the trial or trials of Galileo. Only recently could the true story be told. All sorts of legends about it had sprung up and were repeated in works by writers of authority. The documents were incomplete, and there was uncertainty as to the genuineness of some of them. A story discreditable to his prosecutors was made worse by fabrications. It was alleged that he had been tortured. There is no proof that he was; the strong probability is that he was not. Words which he never uttered were put into his mouth. We have all heard—probably most of us have quoted—his saying with respect to the motion of the earth—*E pur si muove.* He never said anything of the kind. It is the last thing which he would have thought of saying. It was said for him more than a hundred and fifty years after his death.

Only gradually and slowly has the truth been brought to light. Documents have been obtained piecemeal. The main authority is a manuscript volume of the pro-

ceedings in the Vatican Library (1181 Ex Archivo S. Offij ; contr. Galileum Galilei Mathematicum). This manuscript has had a curious history. It was carried to Paris at the time of the French occupation of Rome in 1811. Napoleon ordered it to be published in full. But this was never done. On the fall of the first Empire it was claimed by the Papal Government. It was missing ; it had disappeared from the National Library in Paris. Finally, it was found in the French king's private library. In 1846 it was given up by Louis Philippe, and was presented to the Pope by Rossi. A condition of the surrender was that the entire proceedings should be published. This was not done. Marini, it is true, published certain extracts. But they were selected with a purpose and with a design, viz., to shield the Holy Office from odium. Some further documents were published subsequently by Berti. It is probable that all which is material is now published. For a time there was much doubt as to the genuineness of one important document to which I shall advert. But this doubt has been removed. Favaro, who has published a collection of all the extant documents, states [1] that the discussions as to the authenticity of the documents are at an end :

'To-day we are of opinion that there is no longer any one who honestly suspects that the documents have been purposely altered in any way ; and in particular the publication of the *Decreta* in full has conduced to that result, for they show from first to last a perfect correspondence between the two series of records which deal with the subject. . . . Thus the story of Galileo's condemnation may be written at last in all its completeness ; there is really no need of rhetoric or invective to bring to light its true significance ; for, setting aside all quibbles about the authority which pro-

[1] A. Favaro, *Galileo e l'Inquisizione*, p. 8.

nounced it, the sentence was, if not the greatest, at least one of the most serious mistakes which the Roman Curia has made, though that body expiated it—perhaps not yet in full—on the day when it had to expunge the condemned dialogue from the Index, and inscribe in the very volumes of the *Decreta* permission to teach, uphold and defend that doctrine which it had already declared to be absurd, philosophically false and formally heretical.' [1]

I revert briefly to a point upon which I touched in describing Bruno's trial. I recall the state of belief as to the discoveries and teaching of Copernicus respecting the solar system, the accepted theories in 1613, the date with which we are concerned. Copernicus had died in 1543. His book *De Revolutionibus Ordium Caelestium* had been published in 1543 immediately after his death, and the preface, written by a false and timid friend, stated the new doctrine as a mere hypothesis which he no doubt believed to be true. It did not gain acceptance in the Universities. Luther speaks of ' this fool Copernicus ' who ' wants to overturn the whole science of astronomy'. At the beginning of the seventeenth century to speak of it as a hypothesis was not deemed by the authorities heretical and criminal, to teach it openly was perilous. It had become more and more difficult to maintain this position. The facts revealed by Galileo's telescope were palpably inconsistent with the Ptolemaic system. He had verified the Copernican doctrine by his striking discoveries; his telescope had revealed new worlds. He did what so many then did—he equivocated; if he did not equivocate he spoke with reservation more or less guarded. It was a time of terror to all who thought freely; it was, therefore, a time of subterfuges. The choice might be between death, silence, recantation or equivocation. The

[1] Ibid., p. 9.

last in some of its many forms was so much the easiest. Tyranny was met by cunning, intolerance by deception. True, some of the innovators had their holes in which to hide from their pursuers. Sometimes they found refuge with a prince who sheltered them until the chase was given over. More often their only refuge was in some system of subtle reservations or in a double set of incompatible beliefs or in irony perceptible only to the initiated.

Not by constitution a fighter, too much interested in his investigations to seek to end them by martyrdom, Galileo was in no hurry to do battle with the Church. He knew the powers of the Inquisition. Unfortunately he had made a slip; he stumbled into candour. He wrote a letter in December 1613 which revealed his real belief as to the Copernican system.

In 1611 he had visited Rome of his own accord. Though his adoption of the Copernican system was known, though he had taught it in his *Sidereus Nuncius*, though his discoveries of Jupiter's moons and Saturn's ring had strengthened the proofs of that doctrine and he had already incurred the dislike of those who taught or accepted the Ptolemaic system of astronomy, he was received by the Pope and Cardinals with courtesy. His visit was rather a triumph than an incident in a prosecution. He himself was deferential and submissive. He was granted an audience by Pope Paul V who received him kindly. He conversed with Bellarmine, then in a position of great power, and Bellarmine raised no objection. But, quite unknown to him, his enemies were at work. In that very year was going on a prosecution against one Cremonini, and in the proceedings of the Holy Congregation under date of 17 May 1611, is the entry: 'Videatur an in Processu doctoris Caesaris Cremonini sit

nominatus Galilaeus Philosophiae et Mathematicae Professor.'[1] Very soon after was lodged an accusation or denunciation of Galileo. He had unwittingly given his enemies an opening. In February 1615 Fra Nicolo Lorini, a Dominican of Florence, transmitted a writing by Galileo—a letter to Benedetto Castelli—which, maintaining the Copernican doctrine that the earth moves, 'contains,' said the denunciation, 'many suspect or rash propositions.'[2] The denunciation enclosed a copy of a letter from Galileo to his devoted friend and pupil, Castelli, a letter upon which much turned. It was written in consequence of a talk at the table of the Grand Duke of Tuscany at Pisa about Galileo's discoveries. Castelli had upheld the Copernican view. He had left the Palace, but was called back, and when he returned he found the Grand Duke's mother attacking the Copernican doctrine as unscriptural. Castelli told Galileo of this incident. The result was a letter, laying it down that the Bible and Nature are both compatible with the Copernican system. This letter, written[3] the 21st December 1613, was intended to remove doubts raised by the Archduchess Magdalena of Austria, wife of Cosmo Medici. He stated that the decrees of Scripture cannot err, but its interpreters and expositors may, especially when they adhere to the literal truth, which would lead to contradictions:

'Thus many statements are to be found in the Scriptures, some of which appear according to the literal meaning of the words to diverge from the truth, but are dressed up in such a way in order to adjust them to the ignorance of the crowd.'

He quotes the saying of Cardinal Baronius: 'The Holy

[1] K. von Gebler, *Galileo Galilei and the Roman Curia* (tr. Sturge), p. 36.
[2] D. Berti, *Il Processo Originale di Galileo Galilei*, p. 16.
[3] Ibid., p. 18.

Spirit intended to teach us how to go to heaven, and not how the heavens go.' He proceeded to say:

'if theology occupies herself solely with the highest problems, maintains her throne by reason of the supreme authority conferred upon her, and does not condescend to the lower sciences as not affecting salvation, the professors of theology should not assume authority on subjects which they have not studied. For this is just as if an absolute ruler should demand, without being a physician or an architect, that people should treat themselves, or erect buildings, according to his directions, to the great peril of poor sick people and obvious ruin of the edifice.'

True, 'It is,' he says,

'the part of wise interpreters of Holy Scripture to take the pains to find out the real meaning of its statements, in accordance with the conclusions regarding nature which are quite certain, either from the clear evidence of sense or from necessary demonstration. As, therefore, the Bible, although dictated by the Holy Spirit, admits, from the reasons given above, in many passages of an interpretation other than the literal one; and as, moreover, we cannot maintain with certainty that all interpreters are inspired by God, I think it would be the part of wisdom not to allow any one to apply passages of Scripture in such a way as to force them to support, as true, conclusions concerning nature the contrary of which may afterwards be revealed by the evidence of our senses or by necessary demonstration';

a courteous, temperate, conciliatory letter, which declares the writer's willingness to sign an opinion of wise and well-informed theologians as to the Copernican theory, but which concludes with the significant remark, 'it is not in the power of any human being to make (statements) true or false, or other than they *de facto* are'.[1]

Meantime, unknown to Galileo and his friends, the Inquisition was secretly at work. It was deemed necessary

[1] Gebler, p. 70.

to do what hitherto had not been thought essential—to define the position of the Papacy towards the Copernican system which hitherto had been regarded with suspicion, but never formally condemned.

26 February 1615. Order by Cardinal Mellini, President of the Holy Congregation to its Secretary, to procure 'in a skilful manner' the original letter. There was some difficulty in getting it; but Galileo, conscious of his innocence, supplied a correct copy. Then came the first formal step in the proceedings. 19 March 1615—order for the examination of Father Caccini of Florence, who was said to be specially acquainted with the errors of Galileo.[1]

20 March 1615. Examination of Father Caccini. He repeated the contents of a sermon which he had preached on the passages, 'Sol ne movearis,' 'Viri Galilaei quid statis aspicientes in caelum?' He added certain new charges; Galileo maintained that 'God is not a self-existent being, but an accident; God is sentient because the Divine sentiments reside in him; the miracles said to be performed by the saints are not real miracles'.[2]

There was much delay, partly owing to the examination of two witnesses, Father Ximenes, a Dominican, and a young nobleman, Attavanti, who, however, could tell little, it was found.

The Inquisition decided to do nothing as to Caccini's accusation. But they turned to an examination of the Copernican doctrine.[3] For more than three-quarters of a century it had been before the world, but no opinion had been expressed as to it. But on the 23rd of February the decisive step was taken. The Assessors who had been

[1] Berti, p. 28.
[2] Gebler, p. 57.
[3] F. H. Reusch, *Der Process Galileis und die Jesuiten*, p. 108.

appointed to examine the matter declared heretical these two propositions :

1. The sun is the centre of the world, and immovable from its place ;

2. The earth is not the centre of the world, and is not immovable, but moves, and also with a diurnal motion.[1]

The first proposition, they said, was ' stulta et absurda in philosophia, et formaliter heretica '. The second, they were pleased to say, was equally censurable in a philosophical point of view, and ' spectando veritatem theologicam, at minus esse in fide erronea '.

Rumours having reached Galileo of what was going on, he went to Rome, not in consequence of a citation. As he himself said, ' In the year 1616 I came to Rome of my own accord, without being summoned.' [2]

When he arrived, he was informed of the censure which had been passed upon the Copernican doctrine.

On the 25th February 1616, Cardinal Bellarmine, who was his friend, was to call Galileo before him and to admonish him not to treat in any way of the immobility of the sun or the motion of the earth, ' si vero non acquieverit, carceretur.' [3]

Accordingly next day (26 February 1616) Cardinal Bellarmine called Galileo before him. The official note of the interview states that Galileo was commanded and enjoined ' to relinquish altogether the said opinion that the sun is the centre of the world and immovable, and that the earth moves ; nor henceforth to hold, teach, or defend it in any way whatsoever, verbally or in writing ; otherwise proceedings would be taken against him in the Holy Office '.[4]

[1] Gebler, p. 76.
[2] Ibid., p. 71.
[3] Berti, pp. 9, 52 ; Gebler, p. 77.
[4] Ibid., p. 78.

26 February 1616. Cardinal Bellarmine reports Galileo's promise to obey. 'The tenor of which is that *omnino desereret dictam opinionem* nec et de coetero illam quovis modo teneret, doceret et defenderet, alias contra ipsum in S. Ufficio procedetur.'[1] It was a dramatic meeting, significant and memorable; one can think of few in history more so; the meeting of the old and the new, and at a crisis of both. No better representatives could have been found of both—Galileo, the bold investigator, pursuing scientific methods to their last consequences, the forerunner of modern science and its methods; Bellarmine, a great figure, how great it is not easy for us now to conceive; scholar, jurist, controversialist, 'the most powerful controversialist in defence of Popery, that the Romish Church ever produced';[2] a great arresting force; the most formidable fighter in the war then waging in Europe between the secular and ecclesiastical powers. To grope among the many controversies in which he took part is very much like driving the plough through an old-world battlefield. The ploughshare turns up antiquated weapons and the remains of men of common stature, but it also lays bare the bones of a giant. For such he was, and it was a giant's work which he did. In his several treatises, notably that respecting the papal power in temporal matters, he erected the strongest fortress against the secular power; a fortress which successive generations of publicists and theologians sought to breach. If Ilium was to be saved, it was by his right hand. That richly gifted nature was a strange compound of gentleness and remorselessness, of severity to himself as

[1] Berti, p. 9.

[2] R. F. R. Bellarmino (Card.), *The Notes of the Church*, &c. (1839), p. vii.

well as to others. His autobiography is a story of humility and integrity. He who would not kill gnats or vermin, though preying on him, because, as he said, this earth was their paradise as they had no other, was likewise the author of the maxim *Mors hereticorum pax ecclesiae*, and taught that everything was permitted to the subjects of excommunicated princes.

In all probability it was a friendly meeting; at all events, before Galileo left Rome he got from Bellarmine the remarkable certificate (26 May 1616) in which the Cardinal denying the truth of calumnious reports says that:

'Signor Galileo has not abjured, either in our hand nor the hand of any other person here in Rome, or anywhere else, so far as we know, any opinion or doctrine held by him, neither has any salutary penance been imposed upon him; but only the declaration made by the Holy Father and published by the Sacred Congregation of the Index has been intimated to him, wherein it is set forth that the doctrine attributed to Copernicus, that the earth moves round the sun, and that the sun is stationary in the centre of the world, and does not move from east to west, is contrary to the Holy Scriptures, and therefore cannot be defended or held.' [1]

I have enumerated the chief steps in the first trial which concluded (5 March 1616) with the Decree of the Holy Congregation putting in the Index certain books, and condemning the false doctrine of Copernicus—an opinion *in perniciem Catholicae veritatis.*

It is usual to speak of Galileo's first trial. But the proceedings scarcely amounted to that. There was a denunciation. But Galileo was not formally cited. He was not examined. Nor was he condemned to any punishment. He was merely admonished. If the proceedings

[1] Gebler, p. 88.

had ended there, little would have been heard of the first trial.

I come to the second trial. I am inclined to think that it would not have taken place had Bellarmine been still alive. Some sixteen years had passed; Galileo had continued his investigations; the proofs of the Copernican system had accumulated; he was in high esteem, though he had enemies whose power he underrated. His fame had grown; he published no works openly defending the Copernican doctrine, though in letters to his scientific friends he maintained or assumed it. Perhaps he was not very clear as to the exact scope of the injunction laid upon him or the nature of his promise. He may have hoped much from the new Pope Urban VIII, a lover of learning; one of a very different disposition from his predecessors, Paul V and Gregory XV. At all events he gave to his enemies an opening which they were quick to use.

In 1632 he published his *Dialogues on the Two Principal Systems of the World, the Ptolemaic and the Copernican*, a work in which two of the interlocutors defended by scientific reasoning the double movement of the earth, while the third interlocutor, named, perhaps with some significance, 'Simplicius', supports, with feeble reasoning, the opinions of the Aristotelian school. The pretence or semblance of impartiality deceived no one. In his preface to the *Dialogue* he states that he is 'proceeding by pure mathematical hypothesis, seeking by every method known to art to represent its superiority, not of course in an absolute sense, to the theory of the immovability of the earth, &c.'[1] He adds with irony:

'I hope these considerations will prove to the world that, if

[1] Berti, p. 69.

other nations have been greater navigators, we have not been behindhand in speculation; and that if we fall back on the assertion that the earth is stationary, taking the opposite view merely by way of mathematical caprice, that does not arise from a disregard of the many others who have given their attention to the subject, but, if for no other cause, by reason of the powerful support which is lent to it by piety, religion, and a consciousness of the weakness of the human mind.' [1]

For the printing of the *Dialogues* at Florence Galileo had experienced difficulty in getting a licence. But the *imprimatur* had at last been granted, and the book met with great approval, when there suddenly burst upon its author a storm more violent than that from which he had escaped. First the sale of the book was stopped by orders.[2] Then was appointed a commission of theologians and men of science to examine it. In one month the commission made a report highly unfavourable to Galileo. It found:

'(1) That without orders and without making any communication about it he put the *imprimatur* of Rome upon the title page.

(2) That he had printed the preface in different type, and rendered it useless by its separation from the rest of the work; further, that he had put the saving clause at the end in the mouth of a simpleton, and in a place where it is hard to find; that it is but coolly received by the other interlocutor, so that it is only cursorily touched upon and not fully discussed.

(3) That he had very often in the work deviated from the hypothesis, either by absolutely asserting that the earth moves and that the sun is stationary, or by representing the arguments upon which these views rest as convincing and necessarily true, or by making the contrary appear impossible.

(4) That he had treated the subject as undecided and as if he were waiting for, though he does not expect, explanation.' [3]

The report further found that he had broken the

[1] Berti, p. 70. [2] Gebler, p. 166. [3] Ibid., p. 173.

injunction laid upon him in 1616. The fact was he had fooled the Holy Congregation; fooled a Pope who did not stand opposition; subjected to ridicule the Papal decree.

Such a crime according to inquisitorial usage demanded severe punishment.[1]

From that point things moved fast.

23 September 1632. Order from the Pope for Galileo to appear before the Commissary-General.

9 December 1632. Peremptory order to that effect.

30 December 1632. Further order; the Inquisition is no longer to tolerate the 'subterfuges' put forward for non-appearance; Galileo is to be sent to Rome 'carceratus et ligatus cum ferris'.[2]

Galileo long temporized. He pleaded his weakness. He spoke of his great age, his feeble health, his blindness, his contrition, his piety, his submission. His friends urged that, ill as he was, he might die on the road. All to no purpose. The Pope was angry and inflexible; he had been fooled and was inexorable. 'He can come very slowly in a litter, but he must be tried here in person. May God forgive him for having been so deluded as to involve himself in these difficulties, from which we had relieved him when we were Cardinal.'[3]

Galileo was overwhelmed with grief and in despair.

'This vexes me so much,' he wrote to a friend, 'that it makes me curse the time devoted to these studies in which I strove and hoped to deviate somewhat from the beaten track generally pursued by learned men. I not only repent having given the world a portion of my writings, but feel inclined to suppress those still in hand, and to give them to the flames, and thus satisfy the longing desire of my enemies to whom my ideas are so inconvenient.'[4]

[1] Ibid., p. 174.
[2] Berti, p. 79.
[3] Gebler, p. 183.
[4] Ibid., p. 178.

So to Rome he had to go, travelling by litter and reaching it in February 1633. He appeared on the 12th April 1633 before the Inquisition. He was questioned mostly as to his interview with Bellarmine in 1616.[1] According to him Bellarmine allowed him to treat the Copernican doctrine *ex suppositione*: 'It might be held hypothetically and written about in this sense.'[2] He said that he did not understand the agreement, that he had never bound himself not to teach the Copernican doctrine; pressed in cross-examination he admits that he may have been told that he was commanded not to hold or defend the doctrine. 'It may be that "and *not to teach*" was also there. I do not remember it, neither the definition "in any way whatsoever" (*quovis modo*).'[3] So far he he was not treated harshly; large comfortable apartments were put at his disposal for himself and his servants;[4] he was a prisoner only in name.

On the 30th April 1633 was the second examination, and with it came an astounding change. At the first hearing he had denied that he had maintained the Copernican doctrine or broken any command or promises. He now admitted his error; he owned that there is some taint of disobedience in his writings. 'My error, then, has been—and I confess it—one of vainglorious ambition, and of pure ignorance and inadvertence.' He went farther in his abject recantation. 'In confirmation of my assertion that I have not held and do not hold as true the opinion which has been condemned, of the motion of the earth and the stability of the sun—if there shall be granted to me, as I desire, means and time to make a clearer demonstration thereof, I am ready to do so.'[5] Which was

[1] Berti, p. 85. [2] Gebler, p. 203. [3] Ibid., pp. 204–5.
[4] Ibid., p. 209. [5] Ibid., p. 215.

worse, one asks, the tribunal which burnt Bruno, or that which extorted such a humiliating confession?

10 May 1633. Another hearing. Galileo urges that in the course of fourteen to sixteen years he had forgotten the injunction not to hold or teach in any way the obnoxious opinion. He urged too in mitigation his advanced age and pitiable bodily indisposition.

Still the Congregation was not satisfied. It was part of the jurisprudence which it administered not to be content with merely verbal confessions; it would pry into the most secret recesses of the conscience in order to detect the true belief.

On the 16th June 1633 the Holy Congregation decreed

'ipsum Galilaeum interrogandum esse super intentione et comminata ei tortura, et si sustinuerit, previa abiuratione de vehementi in plena Congregatione S. Off. condemnandum ad carcerem arbitrio Sac. Congregationis, Iniunctum ei ne de cetero scripto vel verbo tractet amplius quovis modo de mobilitate terrae, nec de stabilitate solis et e contra sub poena relapsus.' [1]

21 June 1633—further examination and again an abject confession: 'I do not hold, and have not held this opinion of Copernicus since the command was intimated to me that I must abandon it; for the rest, I am here in your hands, do with me what you please.' The report here says, 'Ei dicto quod dicat veritatem alias devenietur ad torturam': the broken old man could but say, 'I am here to obey, and I have not held this opinion since the decision was pronounced, as I have stated.' [2] He must drink the dregs of the cup of humiliation.

22 June 1633. In the Dominican Convent of St. Maria sopra la Minerva, his sentence and recantation; sentence that the publication of the *Dialogues* be prohibited, and

[1] Ibid., p. 223 *n*. [2] Ibid., p. 227.

that Galileo be condemned to the formal prison of the Holy Office during pleasure. The last step of all was his formal recantation. It was abject and unqualified. Having admitted that he had broken the injunction of the Holy Office as to holding and teaching the Copernican doctrines, and that he is justly suspected, he proceeds: 'With sincere heart and unfeigned faith I abjure, curse and detest the aforesaid errors and heresies, and generally every other error and sect whatsoever contrary to the said Holy Church; and I swear that in future I will never again say or assert, verbally or in writing, anything that might furnish occasion for a similar suspicion regarding me.'[1] There was no physical torture, there was no dungeon, but no humiliation was spared him.

And here I may advert to facts and circumstances apt to be forgotten, but necessary for the understanding of the truth; facts which make me think that the second prosecution would not have been instituted a few years earlier or a few years later.

I have mentioned that in the course of the proceedings certain books were prohibited, while others were forbidden *donec corrigantur*; some placed in the *Index Prohibitorius*, others in the *Index Expurgatorius*. At the time of which I speak some such practice as this had become well nigh universal on the part of the State as well as of the Church; the State did what the Church did, though not so systematically.

It is true that the practice of prohibition in a rudimentary form goes much farther back than the sixteenth or seventeenth century. The claim to exercise jurisdiction over literature, to give it the Church or State hallmark, is an old claim. You may read of it in Milton's

[1] Gebler, p. 243.

speech for unlicenced printing. Various Councils forbade the publication of certain books; e. g. the Council of Nicaea (325).[1] The invention of printing made the matter more important.

Church and State alike were active and vigilant in guarding against abuses and perils connected therewith. During the sixteenth century all over Europe the exercise of this censorship became common. The right was claimed by all public ecclesiastical bodies, including the Universities. It was claimed even by individual superior ecclesiastics and by the supreme civil magistrate.[2] Wolsey in 1520 issued a prohibition of the works of Luther; so did Henry VIII;[3] so did Mary. Henry VIII issued orders forbidding the printing of certain books. The ordinance of 1529 enumerated eighty-five. It was the same year in which Charles V[4] issued a similar prohibition. At first these indices were prepared mechanically and unintelligently; the compilers copied from the Louvain and Spanish Index.[5] A little before the time with which we are concerned the matter had been systematically dealt with. An Index *auctorum et librorum* was published in 1559 under Paul IV. Next comes one prepared by a commission in 1562–3 and published in 1564 by Pius IV; another in 1590 under Sixtus V; another in 1596 under Clement VIII. About this time too were prepared ten rules for the guidance of the Congregation, rules laid down in the Bull of the 24th March 1564. I quote one of these rules:

'Rule IX. All writings about geomancy, hydromancy, aeromancy, pyromancy, oniromancy, cheiromancy and necromancy;

[1] F. H. Reusch, *Der Index der verbotenen Bücher*, i. 9.

[2] J. Mendham, *The Literary Policy of the Church of Rome*, &c., p. 13.

[3] Ibid., p. 20. [4] Reusch, p. 87. [5] Ibid., p. 6.

or which treat of sacrileges, sorceries, poisons, auguries, or magical incantations are utterly rejected. The bishops shall also diligently guard against any persons reading or keeping any books, treatises or indexes which treat of judicial astrology or contain presumptuous predictions of future events, or contingencies, and fortuitous occurrences, or of those actions which depend upon the will of man.' [1]

But such operations and observations of natural things as are written on and of navigation, agriculture and medicine are permitted.

I cannot but think that had the matter arisen a few years earlier or a few years later the condemnation of the Copernican system would not have found its way into the Index. To be fair to its authors, they rarely threw themselves right across the path of physical science. It was doctrine and words which they sought to control. But once the condemnation was pronounced it was persisted in. To-day this practice survives only in the case of the drama. The Censor of plays is the direct and only descendant of the authors of the Index and of the licensing authority of the Star Chamber.

[1] Reusch, p. 338.

VII. SERVETUS

I COME to the history of a trial somewhat similar to that of Bruno, though the prosecutors were very different; a trial nominally for heresy but also due to other causes; a trial the scene of which is not Rome but Geneva; the Court which condemned the accused not the Inquisition, but one composed of its enemies; a trial often examined as an incident in the history of thought, but with peculiarities of interest to the jurist; a trial, it may be, not without its instruction for the present. Like Bruno, Vanini, Campanella, and so many of the more daring innovators, Servetus came from the south of Europe, in this case Spain. Servetus had other points of resemblance to Bruno. He, too, was a son of the Renaissance; smitten with the love of novelties; with his face turned towards the future; not gifted with Bruno's poetical or philosophical genius, but a true scientific inquirer, and with a wide range of attainments and varied interests compatible with insight into all of them. Whether his admirers have correctly maintained that he preceded Harvey in discovering the circulation of the blood, I do not undertake to say; I leave that to experts. If he busied himself with astrology, he was none the less in advance in many things of his age. Like Bruno he was eager for knowledge, inquisitive, restless, cosmopolitan; somewhat arrogant, self-confident. His was 'a fiery, richly-endowed, extravagant nature, with a keen intellect and powerful imagination, ambitious and bold and full of pugnacity'.[1]

[1] F. W. Kampschulte, *Johann Calvin, seine Kirche und sein Staat in Genf*, ii. 170.

A born fighter, full of confidence in his own prowess, he saw that the war of Michael and the dragon was at hand; and he, Michael Servetus, was to be the Michael. He battled chiefly with the theologians of his time. But an innovator in all things, especially in medicine, he attacked the doctors also. Both were wrong, and the latter were the pest of the world. Like Bruno, Servetus was a wandering scholar. They were kinsmen of Paracelsus and Cardan and of so many others of that time; never able to settle in one place; fleeing from one country to another; their inward lives reflected in their restless goings to and fro. Born at Vilanova in Aragon in 1509 Servetus had left his native land in circumstances somewhat obscure. He studied law and theology at Toulouse in 1528. It is said that to escape his enemies he changed his name; he called himself Villeneuve. We find him at various places in quick succession. He wandered into Italy, and thence to Germany, Switzerland, and France, to Paris, Orleans, and Lyons. He had no abiding place. We hear of him as a press corrector at Lyons, where some of the great printers of the time had established themselves. There he edited an edition of Ptolemy's Geography. He returned to Paris, where he taught geography, mathematics and astrology. Profoundly interested in theology, he agreed with no one; he took up a position midway between Protestants and Catholics. While espousing with ardour some of the tenets of the Reformers, he did not stop where they did, but went on to draw conclusions from which they recoiled with horror. To them he was a theological anarchist throwing bombs about. He got into trouble at Basel with Œcolampadius. He wandered to Strasburg and got again into trouble there. He had printed at Hagenau in 1531 *De Trinitatis erroribus Libri VII*,

a book which was the beginning of his persecutions. Next we find him at Charlieu, practising as a physician, then at Paris, where he published a heretical book on judicial astrology. A decree of parliament compelled him to leave, and in 1540 we find him at Vienne in Dauphiné.

Here also he practised as a physician under the name of Villeneuve, and was for a time prosperous and at peace. He had the friendship of the liberal-minded archbishop and might have remained in quiet but for a step which he there took. He secretly printed a work *Christianismi Restitutio*, 1553 (of which it is said only three copies now exist), in which his opinions were most boldly avowed and defined; an iconoclastic work, full of doctrines abhorred by Reformers and Catholics alike. A copy reached a friend of Calvin, Guillaume de Trie. This man wrote to Vienne complaining that the Catholics allowed such a book to be printed. This was communicated to the Inquisition of the diocese, who took action against Servetus *alias* Villeneuve, *alias* Reves. A prosecution being instituted by the Vienne Inquisitor, Servetus was arrested on the 4th April 1553. There was a difficulty in obtaining evidence against him. It was essential to bring home to the physician quietly practising at Vienne the authorship of the obnoxious book, a matter not then so easy as it is now. The censorship and risks of authorship made all sorts of subterfuges common on the part of honest men. Books were printed in many secret ways. The title-page of a volume might bear the name 'Paris', but it might well be that it was actually printed in Holland. It was not disgraceful to print books under false names. Additions to the text, excisions also were made, if some purpose was to be gained thereby. The hunted author grew cunning. All was fair in war and authorship.

The missing link between the anonymous writer of the *Christianismi Restitutio* and Servetus was supplied by Calvin, and in a way which was a somewhat shabby act on the part of a great man. Fancy a religious teacher doing third-class police or private-agency work! But the men hated each other. They had also a fascination for each other. Calvin regarded Servetus as the enemy of light; and viewed him—'ce vilain chien'—as the most dangerous enemy of all that was good and sacred, worse than all others in using poisonous weapons.[1] It was right and necessary that he should be cut off. In a letter he makes the remark that Bucer, as he says, 'a mild-hearted man,' has said of Servetus, 'dignum esse, qui avulsis visceribus discerperetur.' To his friend, Farel, he wrote that if Servetus ever got to Geneva, he would do his best that he should not leave the town alive. Between the two men was repugnance arising not only from difference of opinions, but from characters radically hostile to each other. Passage after passage in the *Institutes* may be found wherein Calvin breathes out his hatred of Servetus's teaching and the man himself, his gross and foul errors, his 'devilish error'.[2] I may be wrong, but I do not think we shall understand the trial aright if we do not see that Calvin felt that this was a bolder and more dangerous foe than any he had fought with. Servetus had between 1546 and 1548 corresponded with Calvin, at the outset, it may be, with some wild hope of convincing the reformer of his errors. The controversy had degenerated into recriminations and abuse creditable to neither, though very much after the manner of the time, and had closed in fierce

[1] 1553. Calvin had heard of the mischief which Servetus's writings were doing in Italy and elsewhere. *Opera*, xiv. 577 (in *Corpus Reformatorum*, vol. xli).

[2] Calvin, *Institutes*, i, 15, 5.

anger. It was no mere literary quarrel, turning on bad latinity, or a wrong reading of a passage, or plagiarism. The correspondence breathes mutual repulsion. That impression is confirmed by the many references to Servetus in Calvin's *Institutes*. Of no one does he speak with so much bitterness. 'Exitiale monstrum';[1] 'cavendum est a diabolica imaginatione Serveti';[2] 'diabolicus error'; 'delirium';[3] 'prodigiosus nebulo'.[4] Such are some of the expressions.

Calvin had retained Servetus's letters; and, when requested by Trie to put them at his disposal for the purposes of the prosecution, he forwarded them to Vienne. Opinions may differ as to his share in the trial and condemnation of Servetus. There can be but one as to his gratuitously supplying information to the Inquisition, and putting at its disposal letters sent to him *sub sigillo*.

Against these all the evasions of Servetus could not avail. Yet some of his judges, it would seem, were not over-anxious to sacrifice him. Whether they feared that they themselves might be compromised, or whether they felt some reluctance to act as Calvin's executioners, they kept but a negligent watch over their prisoner and on the 7th of April he escaped. Now that he had gone there was nothing to be done but condemn him *in absentia*, and condemned he was.[5] On the 17th of June his effigy and his books were burnt in the market-place of Vienne.

Meanwhile Servetus was wandering through France in search of refuge. It would appear that he tried the

[1] Ibid., ii, 14, 5.
[2] Ibid., ii, 9, 3.
[3] Ibid., i, 15, 5.
[4] Ibid., ii, 10, 1.
[5] The sentence against Servetus by the Vienne Court is proved by Allwoerden, *Historie van Michael Servetus*, p. 57.

Spanish frontier but failed. Accordingly he made for Italy, and in doing so determined to take Geneva by the way. Why he should have done so is one of the unsolved riddles of history. He knew all along that Calvin had set the Inquisition on his track, and no satisfactory explanation has yet been suggested for the strange aberration which placed him in the hands of his greatest enemy.

To Calvin we must now turn.

Born at Noyon in Picardy in the year 1509, Calvin had like Servetus been trained in the Law, but the spread of the Reformation had turned his thoughts to Theology. As the France of Francis I was no safe place for Protestants he fled to Switzerland, and in 1536 settled at Geneva, where, but for an exile of three years, he was destined to spend the rest of his life. Political conditions were favourable, and accordingly, in spite of considerable opposition from dissentients in the city, he was enabled to put in practice that ideal constitution of the Church which at the early age of twenty-five he had developed in the *Institutio Christianae Religionis*, which gave to Protestantism that cohesion and organization which were to be so valuable in its struggle with the Counter-Reformation. He has been compared to Ignatius Loyola, but in the latter are elements of mysticism and signs of imagination unknown to Calvin. I think of him as one of those types of lofty austerity which France of all countries seems to produce—the Arnaulds and Pascal, the Jansenists and the Huguenots.

His position in 1553 was exceptionally difficult. The Senate was against him. His opponents in the Council of Two Hundred were hopeful of breaking the political power of the Clergy by excluding them from the General Assembly. In that year Calvin writes despondently, ‘eo

prorupit improbitas ut retineri qualemcunque Ecclesiae statum diutius posse meo praesertim ministerio vix sperem.' [1] Among his chief opponents was a clever and brilliant member of an old family, Amied Perrin, then First Syndicus and General Captain; formerly a friend of Calvin; one who had much to do with Calvin's recall from exile, but now classed as foremost among the *méchants*. Calvin and Perrin could not reign together. One must yield. It was not to be Calvin, though in 1553 it looked as if this might be.

On the 12th of August Servetus arrived at Geneva, putting up at the Golden Rose Inn. He remained there apparently unknown. But, as the story goes, having entered St. Peter's Church, he was recognized. He had intended to take a boat next morning and to go to Zurich on his way to Naples. But in the evening of the 13th of August he was arrested. Calvin admitted that he had brought this about.[2] He saw a chance of this monster of wickedness meeting with his deserts. It was not to be missed.

'Tandem huc malis auspiciis appulsum, unus ex syndicis, me auctore, in carcerem duci iussit, neque enim dissimulo, quin officii mei duxerim, hominem plus quam obstinatum et indomitum, quoad in me erat compescere ne longius manaret contagio.' [3]

I am afraid that from the outset he [4] meant to slay Servetus. A week after the arrest, Calvin writes to his friend, Farel,[5] 'Spero capitale saltem fore judicium; poenae vero atrocitatem omitti cupio.' It is ridiculous to say, as some apologists have said, 'Calvin did not in the

[1] P. Henry, *Das Leben J. Calvins*, iii. 95 *n*.
[2] Ibid., iii. 151.
[3] Quoted by Henry, iii. 151.
[4] Kampschulte, ii. 182.
[5] 20 August 1553.

least intend to inflict on him the death-penalty.'[1] That was just what he wanted to do.

The nominal prosecutor was La Fontaine, who was a mere dummy, the mouthpiece of Calvin; according to some, Calvin's cook,[2] according to others, a domestic servant, according to others, a servant and secretary. By the law of Geneva it was required that: (*a*) the grounds for an arrest must be declared within twenty-four hours, failing which the person accused was released; (*b*) all criminal charges must be made at the instance of some one aggrieved; (*c*) the prosecutor must be bound over to prosecute; (*d*) he must also go to prison with the person accused and in conformity with the *Lex Talionis* agree, if the charges were not made good, to undergo the penalty which would befall the accused, if found guilty.[3] Accordingly La Fontaine and Servetus were both handed over to the jailer (Jehan Grasset), who had to answer with his life for their custody. The law further required that the accuser should appear the same day, a rough substitute for a writ of habeas corpus. Accordingly on the 14th of August, La Fontaine appeared before the Small Council.

I shall have something to say as to the legal peculiarities of the trial; the many strange irregularities, the defiance of forms, the licence claimed and obtained by Calvin. The lawyer is struck by the confusion and medley of the proceedings and the licence accorded to the prosecution. But to the eye of the penetrating historian, I do not doubt that there is a certain completeness in the story from first to last.

In some trials, certainly in those which I have chosen, there is (may we not say?) a drama played on a large stage,

[1] Henry, iii. 153.
[2] Willis (R.), *Servetus and Calvin*, p. 305.
[3] Ibid.

not 'imitation of an action grave, complete and of a certain magnitude', but such action itself, played before our eyes; an inward principle revealing itself in an outward whole;[1] incidents of life connected by an inward or causal bond;[2] movement and tumult of strong passions; fierce contentions ending in an inevitable and impressive close; time doing for the narrative what the poet does for his own creation. The unimportant and meaningless incidents are hidden, so that to him who sees it all from afar are visible only the protagonists, the great incidents and actions. For him the trial is a drama, and one strictly conforming not only to the unities of time and place, but to the more important unity of action. So much may be said of this trial. To-day, petty incidents becoming invisible or falling into the background, it is seen to be a struggle between two forces eternally warring, the theocratic and the secular, the logical and the phantastic nature; a struggle with varying incidents between the representatives of two orders of thought, between the old and the new. And as is often found in great literature, there is running through the chief drama a minor story, that of the struggle between the political parties in the state with Perrin and Berthelier on the one side and Calvin on the other. The first scene is at a waterside inn in Geneva, the last is on the field at Champel, where the heretic perishes.

I resume my brief account of the long and somewhat complex proceedings.

14 August 1553. Nicholas La Fontaine appeared before the Lieutenant Criminel of the city and preferred certain charges against Servetus and called for an answer.

[1] Butcher (S. H.), *Aristotle's Theory of Poetry*, p. 270.

[2] Ibid., p. 271.

The mention of that functionary reminds one that the organization and procedure were akin to those of France. The baillis and sénéschaux of the local jurisdictions were replaced by the representatives of the King. They were permitted to nominate lieutenants, at first removable :

'mais le fait se transforma en droit. Les lieutenants devinrent des officiers de judicature que les baillis ne pouvaient révoquer.' [1]
'Au lieutenant criminel était échu le jugement des causes criminelles ; dans notre ancien droit il était le juge en matière répressive pour toutes les affaires importantes, soustraites aux prévôts.' [2]

The indictment took the form of thirty-eight articles, a long and discursive document, prepared, we know, by Calvin.[3] Most of the charges were based upon Servetus's books, *De Trinitatis Erroribus*, and *Christianismi Restitutio*. Article 37 alleged that in the latter book he had made use of scurrilous and blasphemous terms in speaking of Calvin and the doctrines of the Church of Geneva.[4] The object of the introduction of this count has never been clearly explained, but I hazard this conjecture. It was not so much that it was high treason or *lèse majesté* to speak disparagingly of Calvin. The legal advisers of Calvin may have seen difficulties in convicting Servetus of any crime committed within the territory of Geneva ; it might prevent failure to prove that within the protection of its law he had slandered or libelled some one.

The preliminary charges or information having been heard, the next step was for the Lieutenant Criminel to communicate this to the court composed of the Syndics of the city and the Council. Then came (15 August) the hearing of the case which began before the Syndics and the Council. The prosecution demanded that Servetus

[1] A. Esmein, *Histoire de la Procédure criminelle en France*, &c., p. 34.
[2] Ibid., p. 35. [3] Henry, iii. 154. [4] Article V.

should be put on his trial for heresy and blasphemy, and also for wicked calumnies circulated against true servants of God, more especially Monsieur Calvin. He had answered yesterday in a frivolous manner to the questions put to him. Let him be required to answer formally to each of the articles in the charges. The court, having decided that a *prima facie* case was established, adjourned to the afternoon, when the trial began in earnest in the bishop's palace. Servetus was questioned as to his past. There was much theological discussion, ending on the whole in the triumph of the prosecution.

16 August. Philibert Berthelier takes his seat as assistant to the Lieutenant, while Colladon acts as counsel for La Fontaine. There is fierce strife between Berthelier and Colladon; the quarrel assuming the appearance of one between Calvin's party and Berthelier's, Servetus the prisoner being the centre of a fight for supremacy in the State. Colladon and La Fontaine produce the writings of Melancthon and Œcolampadius in which both reformers condemn the prisoner's writings.

17 August. Calvin comes forward, avows himself the real accuser, and complains of Berthelier's intervention. An extraordinary thing is done; he is permitted not only to appear at the next hearing, but to see the prisoner, therewith the better to show the accused his errors; to assist him and to do what he could with him in respect of his errors. Marvellous mixture and confusion of parts! The Court has not well begun its sittings before the accused is virtually treated as guilty. He is to be admonished before he is tried.

More theological discussions; bold avowals by Servetus of his opinions.

17 August. The prosecution takes suddenly a new

form ; the carriage of it is handed over to the Procureur-Général of the city, Claude Rigot. Nicolas de La Fontaine and his surety are discharged. The prisoner is cross-examined closely as to his life and opinions. His heresies become more apparent from his answers and he is no longer confident and arrogant. Calvin, on the other hand, thinks that all is going well. On the 20th of August he writes his letter to Farel, ' Spero capitale saltem iudicium fore, poenae vero atrocitatem omitti cupio.'

21 August. There is a new development of this strangely changing case. Apparently there was a minority of the Council prepared to stop the proceedings. But on that day it was resolved, ' Inasmuch as the heresies charged against Michael Servetus appear to be of great importance to Christianity ', to continue the prosecution, and also to write to the Inquisition authorities at Vienne in order to ascertain upon what grounds Servetus had been imprisoned and prosecuted, and how he had escaped.

Strangest decision of all, at least from the point of view of the lawyer, it was decided to lay the facts before the Councils of the cities of Berne, Basel, Zurich, and Schaffhausen and the ministers of their churches, and to take their opinion. This had been done in the case of the prosecution of Bolsec with the result that his life was saved, though his doctrines were condemned.

23 August. Again there is a complete transformation of the prosecution. A new indictment, consisting of thirty articles, no doubt in part, if not the whole, the work of Calvin, is laid before the Court. The charges differ very much from those originally formulated, and betray, I am inclined to think, a consciousness of the weakness of the case as first presented. Less is said of the heresies of the accused, more stress is laid upon the dangerous

tendencies of his teaching. There are insinuations against his life. 'The theological element in the prosecution is almost entirely abandoned for denunciations of the socially dangerous nature of the prisoner's doctrines and his persistence in their dissemination.'[1] It is a significant fact that the charge of slandering Calvin, to be found in the first indictment, did not reappear in the second. His enemies were dwelling upon the fact that it was solely Calvin's affair, one more attempt at aggrandisement on his part, and it was politic to drop this count.

Yet again another anomaly in this wonderful prosecution. Calvin, possibly thinking that Servetus might escape, denounces him from the pulpit as a public enemy. No one thought, so far as we know, that this was wrong, no one rebuked him for this conduct. And, again playing a part from which sensitive scrupulous men would have shrunk, Calvin is writing to his friends at Frankfort to get information which may be used against 'this wild beast from hell'.[2]

31 August. There came a slight hitch in the proceedings. From the Court of the Inquisition at Vienne was received a point-blank refusal to send the documents asked for. There was also a request by that Court for extradition of Servetus and his surrender to the Court from whose prison he had escaped. Had Calvin been desirous that the heretic should be punished, but that he and his should have no part therein, they would have seized this opportunity. There is no evidence that they supported this request. The probability is that they did not. At all events the answer was, 'According to our old customs we do not deliver up a criminal once he has come into our hands until he is acquitted or condemned.'

[1] Willis, p. 352. [2] Ibid., p. 346.

1 September. Again, another surprise. The proceedings are for a time turned into a dialectical duel between the two antagonists, the lawyers and the Court standing aside to hear quotations from the Fathers bandied to and fro.

At this point let me parenthetically advert to a circumstance which seems to us strange and unjust, but which was not then so regarded. Servetus had on the 24th of August asked for an advocate to defend him, a request so reasonable, one might have thought, as to admit of no denial. It was, however, met with a refusal, concluded in terms which sound in our ears brutal. But, in fairness to the prosecution, let us remember that a condition of a fair trial deemed now essential, the right of being represented by counsel was not then recognized. The Roman law had admitted it only in a few cases. The laws of procedure founded thereon did the same.

I cannot even summarize the long and wearisome proceedings. I pass over several sittings and come to the 5th of September, when the trial is resumed. Again, to the legal mind there is a marvellous change. The Attorney-General or Procureur-Général steps aside, and the examination of the prisoner is conducted in Latin by Calvin ; and what an examination ! What licence on the part of both accuser and accused. ' It is impossible ', breaks out Servetus, ' not to admire the impudence of the man, who is nothing other than a disciple of Simon Magus, arrogating to himself the authority of a doctor of the Sorbonne, condemning everything according to his fancy.' ' Liar ', ' calumniator ', ' homicide ', are recurring phrases in this long theological brawl.

Yet another gross irregularity. The Council having resolved to consult the Swiss churches and ministers,

Calvin writes letters urging them more or less directly to answer in the terms which he desired. To quote one of these epistles, 'There is but one thing more on which I would have you advised, viz.: That the Quaestor of our City, who will deliver you this, is of a right mind in the business, which is that the prisoner shall not escape the fate which we desire.' [1]

By the 19th and 23rd of October the answers of the Councils of the cities and the Swiss clergy have come in. They are all hostile to Servetus's views; they condemn these as heretical and blasphemous. They refrain from advising that he should be put to death. But there is no word of toleration, no expression of pity, no plea for mercy.

26 October. We are nearing the end. On that day the Council was convoked to consider the sentence. Amied Perrin sought to avert the death sentence; he sought also to carry the matter from the General Council to the Council of Two Hundred. But to no purpose. By a majority the Court decided as follows:

'Having a summary of the process against the prisoner, Michael Servetus, and the reports of the parties consulted before us, it is hereby resolved, and in consideration of his great errors and blasphemies, decreed, that he be taken to Champel and there burned alive; that this sentence be carried into effect on the morrow, and that his books be burned with him.'

Faltering at first, he was in the end calm and brave. His last heard words were, 'Jesu, Thou Son of the eternal God, have mercy upon me.' Calvin had none; Calvin's friends had none. That very day, writing to Farel, he remarks with respect to the efforts of Perrin to save the prisoner from death: 'Our comical Caesar having

[1] Willis, p. 434.

feigned illness for three days mounted the tribune at length with a view to aid the wicked scoundrel to escape punishment. Nor did he blush to demand that the cause might be remitted to the Council of the Two Hundred. But all in vain, all was refused, the prisoner was condemned, and to-morrow he will suffer death.'

And to-morrow he did so suffer, with circumstances of horror which I will not describe.

The fire was lighted at a high place at Champel, so, as it was said, that the flames might be seen from afar. They have been visible ever since. And when all was over, no expression of pity, far less of contrition; no abatement of the fury, which was perhaps natural when the contest was doubtful.

No expression of pity, far less contrition. Calvin visited Servetus in prison and speaks of the 'brutish stupidity of the man'. A little later he writes to his friend, Bullinger: 'If I have but a little leisure, I shall show what a monster he was'; [1] and this he set himself to do in a book published in Latin and French entitled, *Defensio orthodoxae fidei de sacra Trinitate contra errores Michaelis Serveti*. There is no expression of sorrow, but I think I detect uneasy consciousness of the need of explanation. 'All the world knows that since he was convicted of his heresies I never moved to have him punished by death.' It was unnecessary. He had long ago moved enough, laboured so hard for the fatal end, that more was not needed. All from Calvin's point of view was successful. His rule was firmly established; this monster of wickedness in his path was removed. He had said that if Servetus came to Geneva he would not leave it alive, and he had had his way. His chief enemies in the State,

[1] Willis, p. 499.

Berthelier and Perrin, were discomfited. All was cleverly done. Machiavelli would have praised the thoroughness.

I do not know that we realize the significance of all the facts; we do not see that the exile of Bolsec, the death of Gouet, and the burning of Servetus were steps by which Calvin secured his power.

To the lawyer the trial from first to last is an amazing medley, confusion, and vacillation, denoting determination to attain a conviction without clear perception of how to do it—first one prosecutor, then another, then a third, and in the end Calvin, without any official position, dominating the proceedings; first one set of charges, including a count for slander of Calvin; these withdrawn or dropped, without, as might be expected, a verdict or judgement of acquittal being pronounced in favour of the prisoner; then a totally new set of charges substituted; the arguments in Court not confined to the issues thus raised, but allowed to wander into all sorts of theological discussions, and to degenerate into rude personalities; the Court abdicating its functions and taking the opinion of various cities and individual pastors; the real prosecutor, Calvin, in the course of the trial and at a critical point therein, haranguing the people and denouncing the accused, and by letters and otherwise seeking to influence the referees or assessors; the sentence, too, not strictly founded on the charges, but vague and declamatory, and in it no finding as to an offence committed within the territory of Geneva.

To show the straits to which the Court was put in finding reasons for its judgement, it may be stated that among the grounds mentioned were:

'for having perfidiously broken and escaped from the prison of Vienne, where he had been confined because of the wicked and

abominable opinions expressed in his book; item, for continuing obstinate in his opinions, not only against the true Christian religion, but as an arrogant innovator and inventor of heresies against Popery, which led to his being burnt in effigy at Vienne along with five bales of his book.'

Fancy Calvin pursuing a man to death for breaking out of the prison of the Inquisition!

It was actually made a ground for his condemnation that he had defended in court his wicked opinions. Such were some of the reasons for burning him, so that the world should be no longer infected with his 'scandalous, heretical poison'.

One question put by every lawyer will be—'What crime against the laws of Geneva was committed?' At this time there was no doubt as to what was the rule as to jurisdiction. The subject is discussed by Matthaeus.[1]

He quotes the opinion of Baldus:

'inquirere iudicem non posse in crimen in alieno territorio commissum, nisi laesus officium eius et opem imploret. Quam sententiam nonnulli confirmant istoc argumento: idcirco, inquiunt, cognitio criminis ad eum pertinet, in cuius territorio admissum est, quoniam ipsius iurisdictio violata est. At si quid in alieno territorio admissum sit, id nihil ad ipsius iniuriam attinet; verum hanc rationem in levioribus admissis forte probare possis: in gravioribus et iis quae natura probra sunt, nequaquam. Publice enim interest maleficia non abire impunita; abibunt autem facile, si reis praescriptione fori tueri se liceat . . .'

'Sane si praeses eius provinciae, in qua crimen admissum est, petat reum ad se remitti, remittendus est cum prosecutione idonea; aequum enim est in ea potissimum regione exemplum statui, in qua facinus aliquod perpetratum est.'

Calvin was a trained jurist. Law had been his first study. His mode of reasoning and the complexion of his

[1] Matthaeus, *De Criminibus, De Inquisitione*, ch. ii, sect. 8.

style bear marks of his knowledge of Roman Law. Indeed, the lawyer reading Calvin's *Institutes* must regret that the author was lost to jurisprudence. Now it is hard to believe that a trained jurist such as Calvin did not see that he was the prime mover in proceedings hopelessly irregular. I have had to describe two great trials conducted in a democracy for similar offences—one that of Socrates for *asebeia*, the other of Servetus for heresy. The comparison between them is all to the honour of the Athenian tribunal. The sentences in both were errors; but in the trial before the Athenian heliasts were none of the elements of brutality, savagery, and personal spite conspicuous in the other. In the theocratic democracy there may have been a higher standard, but the trial speaks of a lower life.

In those days Geneva was more theocracy than democracy; and it may be that a theocracy in all its forms, crude or refined, calls for human sacrifice, some offer of blood on an altar or in a court. The sacrificial priest and the executioner alike are in Bourdaloue's phrase, 'the ministers of divine justice.'

It has been said in palliation that Calvin was only of his time—the blank pardon served out in respect of every deed of violence; an admission that he, a great moral teacher, was not in advance of his time. In truth he was too much of his own age, more so than Zwingli, for example, and false to his early principles. He was commentator on Seneca's *de Clementia*; in the first edition of his *Institutio* were words of rebuke of persecution, in the last chapters of that work noble words as to justice; and it was an unseemly sequel that he should hound to death one whose very turbulence and vehemence were signs of sincerity.

Let me make one more remark suggested by this trial and by others. There is no accepted test of civilization. It is not wealth, or the degree of comfort, or the average duration of life, or the increase of knowledge. All such tests would be disputed. In default of any other measure, may it not be suggested that as good a measure as any is the degree to which justice is carried out, the degree to which men are sensitive as to wrong-doing and desirous to right it? If that be the test, a trial such as that of Servetus is a trial of the people among whom it takes place, and his condemnation is theirs also.

VIII. KATHARINE OF ARAGON

TRIALS and battles often appear to be among the turning-points in history—trials, I am inclined to think, at certain times, almost as often as battles. They are landmarks by reference to which successive generations may take their bearings. And assuredly few battles fought on English soil, probably none but one or two, have been fraught with graver consequences than the trial to which I now turn, the trial of Queen Katharine of Aragon. We may seek to attenuate its importance—and it is the way of some writers to do so—by saying that it was only an impressive episode in a struggle which had become inevitable; that the pretensions of the Papacy and the claims of the Tudor Crown must have come into collision; that the event, while arresting the eye, counts for little as a cause or influence in the national life. Certain it is that with this trial began a great change in England; began, one may say, a new England. We live to-day, so to speak, under the shadow of that event. True, what we for brevity's sake term the cause of historical events is only part of the whole forces in operation, the salient and selected circumstances, the last impulses to a long movement, a manifestation of forces rather than a creation of them. But the same analysis is, I suppose, equally applicable to so-called decisive battles; they reveal rather than determine the relative strength of nations in conflict. If the attractions of Anne Boleyn had little to do with the Reformation, you must say also that the fair face of Helen had little to do with the Trojan war.

Whatever be our analysis of causes, this trial was a turning-point in history, the focus and converging-point of antagonistic forces. Had the Pope yielded at once to Henry's wishes, had Katharine been compliant instead of surprisingly unyielding, had the commission which Wolsey engineered given judgement in favour of the King, who can tell what would have been the relations of England to the Papacy for many years to come?

I am not very hopeful about giving in one lecture even an intelligible outline of a most complicated story, inextricably mixed with political issues, consisting of many fragmentary episodes, the scene laid in several different places, many persons engaged therein, and, I must add, after minute research by scholars many parts of the story still obscure. It is common to speak of the trial of Katharine. That is misleading. There were several trials before several courts. Some of these trials were never completed, some of them were highly irregular. But all must be mentioned. In one way or other the litigation lasted from 1528 to 1534 and was carried on in England, France and Italy. It is worth observing that even Shakespeare cannot fuse the entire intractable story into a dramatic whole. He suppresses many important incidents, and his play of *Henry VIII* is a series of gorgeous pageantry rather than a coherent drama.

Let us see who were the actors. First, there was Wolsey, the finished type of the prelate of those days; ambitious, worldly to the core; loving the good things of life and wealth in particular; generous; with fine tastes and some virtues, the Christian only excepted; playing his own game while playing his master's, and at last outwitted by people infinitely his inferior.

'He was a man
Of an unbounded stomach, ever ranking
Himself with princes; one that by suggestion
Tied all the Kingdom: simony was fair play;
His own opinion was his law: i' the presence
He would say untruths; and be ever double
Both in his words and meaning: he was never,
But where he meant to ruin, pitiful:
His promises were, as he then was, mighty;
But his performance, as he is now, nothing.'

If all was true of him, it should be added he was

'Exceeding wise, fair-spoken and persuading:
Lofty and sour to them that loved him not;
But to those men that sought him sweet as summer.' [1]

Then there was Pope Clement, naturally weak and irresolute; his native faults aggravated by his dependent position and train of misfortunes; a shifty old man, says Mr. Froude; a Pontiff in a tight place, between the Emperor Charles, King Francis, and King Henry; desirous of conciliating, ever distrustful of all three; a prisoner for a time in the castle of San Angelo; futile and wavering, with outbursts of pride, arrogance, and obstinacy. Then there is Henry. I speak of him only as I find him in these proceedings, without pretending to fathom his nature. Showy, clever, attractive, popular in a way, he has a marvellous art of making everything personal become of supreme consequence. His tastes, his whims, his appetites assume national importance. 'His marriages are royal marriages, his murders royal murders, his diseases royal diseases' says Dr. Stubbs.[2]

I do not know whether it is right to say that Henry VIII

[1] *Henry VIII*, Act IV, Scene ii.

[2] W. Stubbs, *Seventeen Lectures*, p. 245.

is Machiavelli's Prince in action.[1] But I note that in him a certain bluffness is compatible with cunning and hypocrisy. I note last his chief characteristic. There was at this time a form of king-worship of which flattery is no adequate description. The Tudor monarchs were the objects of adulation which recalls and helps to render intelligible the deification or apotheosis of the Roman Emperors, adulation producing the colossal and remorseless egotism which Luther had in his mind when he said of Henry 'Der Teuffel reit diesen König'[2]—'the devil has got astride this king.'

Then there is Katharine, with many true virtues, if of a frosty and prickly character; obstinate, implacable, with qualities repeated in her daughter Mary; obsessed in her misfortunes with one idea, but in all her conduct in the proceedings justifying the King's words of praise touching her:

> 'The queen of earthly queens. She 's noble born;
> And, like her true nobility, she has
> Carried herself towards me.'[3]

Lastly, there is Campeggio, the perfect type of the papal ambassador of the time; no member of the College of Cardinals more trusted by Clement than he;[4] a ripe scholar, theologian, jurist, professor, man of business, statesman;[5] somewhat of a valetudinarian, interested as much in the gout from which he suffered in the ungenial English climate as in the high diplomatic mission with which he was charged.

[1] A. F. Pollard, *Factors in Modern History*, p. 85.

[2] H. Grisar, *Luther*, ii. 381: 'I am glad we are rid of the blasphemer.'

[3] *Henry VIII*, Act II, Scene iv.

[4] S. Ehses, *Römische Dokumente zur Geschichte der Ehescheidung Heinrichs VIII von England*, 1527–34, i, d. xxvi. [5] Ibid., i, d. xvi.

The political situation must be realized to make the strange delays in the trial in any way intelligible. Contemporaneously with the legal proceedings was going on a struggle between the Emperor Charles V and Francis I for supremacy in Europe. The Pope was sometimes a fugitive, sometimes a prisoner; anxious to stand well with the stronger of the two; never able to take a line of his own. The defeat of the French and the downfall of their power in Italy put an end to the Pope's waverings and carried him over to the side of Charles, who was Katharine's nephew. In these political changes we shall find the key to much that is perplexing in the trial.

Let us next see what was the issue in a controversy which for many years divided Europe, and as to the merits of which lawyers still differ. In 1501 Prince Arthur, eldest son of Henry VII, married Katharine of Aragon, daughter of Ferdinand of Aragon and aunt of the Emperor Charles. Their married life was short. Arthur died at the age of eighteen. A Papal dispensation was required to sanction her second marriage with the brother of a deceased husband. It was granted by Pope Julius II in a bull dated 26 December 1503, and in a *breve* or brief, of which a copy was produced in the proceedings in England. Subsequently, on the 3rd of June 1509, Henry married Katharine, and lived with her for many years.

Now the legal question was whether this marriage was valid, in other words, whether the papal dispensation was effective or null. The King's contention was that both the bull and the brief were invalid, the bull because it exceeded the Pope's powers, which did not extend to legalizing a union contrary to divine and natural law:

'quod ducere relictam fratris mortui sine liberis ita sit de iure

divino et naturali prohibitum, ut nullus Pontifex super huiusmodi matrimoniis contractis sive contrahendis dispensare possit.'

The authenticity of the bull of dispensation was not questioned, but the brief was said to be a falsification in the Spanish Chancery;[1] the grounds urged against it being that it was found very late—in 1528, that it sought to remedy serious defects of the bull, that the Emperor Charles refused to deliver it to Henry, who asked for its production.[2] Further, it was urged that there were discrepancies between the bull and the brief,[3] which threw suspicion upon the genuineness of the latter. There were serious defects in the bull itself, which was said to be bad for at least five reasons:—(1) It alleged that the King had desired the marriage, which was not true; (2) it alleged that the marriage was for the purpose of preserving peace with Spain, which also was not true; (3) Henry was only 12 years of age at the time and incapable of binding himself; (4) some of the persons named in the letters of dispensation were dead; (5) the King protested against the dispensation and declared that he was unwilling to marry.[4]

The last and chief objection was that the Pope possessed no dispensing power in regard to a marriage contrary to the express terms of Scripture, i.e. the prohibition in Leviticus xviii. 16 and xx. 21.[5]

The reply to the insinuations regarding the genuineness of the brief was that it had been attested by the Bishop of Toledo and the Papal Nuncio, who examined it in the presence of the Emperor and his Council; that Henry

[1] S. Ehses, *Römische Dokumente zur Geschichte der Ehescheidung Heinrichs VIII von England*, 1527–34, i, d. xxxii.

[2] Acton, *Historical Essays*, p. 48.

[3] Ehses, i, d. xxxv.

[4] Ibid., p. 21; Acton, p. 33.

[5] See S. R. Driver, *Deuteronomy*, xxv 5-10.

acted as if it were genuine;[1] that it had remained in Spain; that it was then carried to Vienna;[2] that it had been seen and examined by impartial persons; and that the discrepancies were trifling.

To the objections to the bull the answer was that the passages in Leviticus were qualified by another in Deuteronomy; that the Pope's power of dispensing was practically unlimited; that it was much too late after many years of married life and the birth of several children, one of whom survived, to annul the marriage.

Such was the question which was raised in 1526, a question which for years engrossed Europe and was finally settled in one way by the Papal court and in another way by Henry's court.

For our purposes let us dismiss the question of the motives of Henry VIII in mooting the question.[3] Viewing the proceedings as lawyers let us note the various steps.

It is not quite certain when Henry began to think seriously of divorcing Katharine, but it was probably somewhere between 1524 and 1526, i.e. after about sixteen years of married life. 'As early as 1526 certainly, and probably as much as a year before, Cardinal Wolsey had been feeling his way at Rome for a separation between Henry and Catherine.'[4] One of the most characteristic steps was to endeavour to obtain legal and theological opinions favourable to the King's wishes and contention. Henry spared no pains or money in order to attain his ends. He sent out his agents far and wide to collect the opinions of experts. They went to Oxford and Cambridge; to

[1] N. Pocock, *Records of the Reformation*, i. xliv.

[2] P. Friedmann, *Anne Boleyn*, ii. 337; Ehses, i, d. xxxiv.

[3] Acton, p. 56.

[4] J. A. Froude, *The Divorce of Catherine of Aragon*, p. 25; Acton, p. 9 *n.*

France, where his ally Francis favoured him; to the Universities of Italy and also to Germany. The King paid handsomely those who said his case was good. It was not surprising that he got the answers which he desired from many jurists and Universities. Some of their opinions, which are to be found in Rymer's *Fœdera* and Pocock's *Records of the Reformation*, are strongly in his favour. I think I may say that such is the character of the opinions given by the majority of the Universities. But he did not meet with equal good fortune in Germany; it may be, because the Pope had issued a prohibition on the subject which affected those under the influence of the Emperor. At all events, there was this strange circumstance—a remarkable body of opinion throughout the whole Catholic world to the effect that the Pope had no such dispensing power as he claimed and that the marriage with Katharine was null, a remarkable body of opinion among the great Protestant theologians, including Luther and Melanchthon, that there was such a dispensing power and that the marriage was valid. Which was right? Upon this point, as to which expert opinion differed so widely, I do not presume to speak decidedly. But I am inclined to think that the solution of the difficulty and diversity is to be found in a movement then going on within the Church. I draw my knowledge, such as it is of the matter, chiefly from Hinschius's elaborate history of the papal dispensing power.[1] It appears that for centuries a contest between the power of the Pope and the power of the General Councils had been in progress, and that since the middle of the eleventh century there had been a disposition in certain quarters to ex-

[1] P. Hinschius, *Das Kirchenrecht der Katholiken und Protestanten in Deutschland*, iii. 725, seq., 744, seq.

tend the legislative and dispensing powers of the Pope so as to make them virtually unlimited. I am summing up the general effect in saying that since Gregory VII the Popes had asserted such a right without limits or qualification as to legislation, and it was a corollary from this claim that he who had the legislative power had also the power of dispensing with the legislator's requirements. The majority of authorities held that the Pope could not abrogate the express provisions of divine or natural law. But they also agreed that it was for him to interpret the divine law in case of doubt; and, as the *crux* of this case might be said to lie in the difficulty in reconciling two texts of Scripture, logically the last word belonged to the Pope. Not the least interesting circumstance is that while the power of the Papacy was increasing, that of the English Crown was increasing also. The papal bull of dispensation was the outward and visible sign of the extreme advance of papal aggrandizement; the decree of annulment of Henry's marriage was the result of the growth and culmination of the power of the Tudor sovereigns.

What I desire to emphasize is that to Henry himself at one time, and to not a few of the reformers, bigamy, not divorce, seemed the way out of the difficulty.

It is characteristic that Mr. Froude in his book *The Divorce of Catherine of Aragon* does not, so far as I can find, advert to the fact. Bigamy seems to us an impossible solution. It did not seem to that generation so dreadful a business as it now appears. To be plain, there was a surprising amount of complacency, uncertainty, and instability of view as to polygamy,[1] and in quarters least to

[1] W. W. Rockwell, *Die Doppelehe des Landgrafen Philipp von Hessen* (Leipzig, 1903).

be expected. There is the famous letter (18 September 1530) from Sir Gregory Cassalis to the King, in which Sir Gregory states that the Pope had suggested that the King should have two wives,[1] whether sincerely or not I cannot say. Bigamy was looked at with not wholly unfriendly eyes by some of the Reformers. Respect for the easy-going patriarchs had bewildered or led them astray. Abraham and Lamech and David had much to answer for. They were seductive examples. Consulted as to the annulment of the marriage, both Luther and Melanchthon advised bigamy as the best and easiest solution, both putting it partly on grounds of *haute politique*. Melanchthon observed that it was the safest course for a king to take. Neither of them was mealy-mouthed or very squeamish on the subject. Luther thought that the less of two evils was a double marriage :

'si [regina] divortium prohibere non potest, ferat hoc magnum malum maximae iniuriae sicut crucem suam, sed nequaquam approbet neque consentiat. Potius id permittat, ut rex et alteram reginam ducat exemplo patrum, qui multas uxores habuerunt etiam ante legem, sed se ipsam non probet a regio coniugio et nomine Anglicae reginae excludi.' [2]

Melanchthon's advice was much the same : 'Ac potest id fieri sine ullo periculo conscientiae cuiuscunque per polygamiam.' [3]

Nor were they alone in their indulgent counsels. Bucer, too, saw the way out, not in divorce, but in bigamy.[4] So did the secretary of Erasmus.[5] Even the great canon lawyer, Cajetan, was apparently of the same opinion ; [6]

[1] Pocock, i. xlix, 428; ii. 5; G. Burnet, *History of the Reformation of the Church of England* (ed. Pocock, 1865), i. 161, 448.

[2] Quoted by Rockwell, p. 213. [3] Ibid., p. 210.

[4] Ibid., p. 206. [5] Acton, p. 50. [6] Rockwell, p. 305.

at all events he used language scarcely susceptible of any other interpretation. Remember, too, that the King himself for a time harboured the idea. When Francis Brian and Peter Vannes went to Rome in December 1528, they had among other instructions from the King instructions to obtain a declaration 'quod possit duas ducere uxores cum legitimatione prolis ex secunda'.[1] Remember, also, that all this was not purely theoretical teaching or speculation. The age was familiar with strange matrimonial transactions, as strange as any to be found nowadays in a remote Western American State. Louis XII in 1499 repudiated his first wife Jeanne de France and married Anne of Brittany, widow of Charles VIII, a course which the French ambassador recommended to Henry.[2] Luther and Melanchthon gave much the same advice to Philip of Hesse, who wished to have two wives at once; they reluctantly consented, and he acted accordingly.

Now just think of what might have been, had Luther's and Melanchthon's advice been taken. Conceive the consequences of a solution of Henry's troubles not by divorce but by bigamy. I do not know that hypothetical history is often very instructive. But I am tempted to pause and indulge in conjecture what might have happened if he had acted upon the Reformers' advice. In these matters it is the first step that counts. The arguments for trigamy are not, I suppose, much weaker than those for bigamy. I do not know that they stop at trigamy. He might have pursued unchecked his matrimonial career and yet have spilled no blood. In an age of general obsequiousness to the throne there would have been courtiers and counsellors to quote Abraham and Lamech,

[1] Pocock, i. 189. [2] Froude, p. 188.

and applaud his action. The theologian who excused the multitude of Solomon's household on the ground that he had to provide for his poor relations would not have hesitated to find apologies for five or six additional wives. Considering the temper of the age as to polygamy, I am tempted to ask whether it is not an accident that Henry's memory is coupled with that of Nero and Blue Beard and not with that of John of Leyden and Brigham Young?

I come to the legal proceedings, which I can only briefly epitomize. Probably, as Brewer suggests, neither Henry nor his minister Wolsey at the outset anticipated great difficulty. They thought that the matter could be rushed through. Katharine was to be cajoled or bullied or pushed aside. They did not know her. She stood firm. She would yield nothing, submit to nothing, compromise nothing. So she was to be defeated by a trick. That was one of the first impulses of the King and his minister.

As papal legate in England Wolsey could convoke and preside over an ecclesiastical court commissioned to deal with matrimonial causes. So in May 1527 what Brewer calls somewhat inaccurately 'a collusive suit' was instituted, calling on the King to answer for the ecclesiastical offence of cohabiting with Katharine, the widow of his brother.[1] Wolsey and Archbishop Warham were the judges in this tribunal which sat in secret at Westminster. Henry was cited to appear before it.[2] Wolsey asked the King's permission to proceed, which the King graciously granted. He then requested the King to answer the charge; which was done. Nothing came of this suit. It was a mistake. Brewer, the most trustworthy historian, remarks as to these futile proceedings that they 'were

[1] J. S. Brewer, *Reign of Henry VIII*, ii. 187. [2] Friedmann, i. 51.

never resumed. It may be, for their obvious absurdity. It may be that as an appeal would always lie from the Papal legate to the Pope himself, Katharine would demur to Wolsey's jurisdiction. More probable still, it was feared that Wolsey and the Archbishop, by sitting as judges in an inferior Court, would incapacitate themselves from sitting in the Legatine Court.'[1] At all events, whatever may have been the reasons, the proceedings were abandoned.

It was a trick or plot which had failed.

'It had been his [the King's] intention, in the first instance, to have managed the whole affair with such complete secrecy that Katharine should know nothing of what was going on until all opportunity for appeal and remonstrance should be shut out. She was to become the victim of legal proceedings in which no plea on her part should be heard, and be condemned by a tribunal of the King's own choosing, which she could neither challenge nor decline—not unlike the process by which she was afterwards condemned by Cranmer.'[2]

I cannot enumerate all the many steps in the interminable proceedings; the Pope alternately complacent and unyielding, now seeking to gratify Henry, now the Emperor, according as their fortunes varied; now making promises, now undoing or qualifying them. I merely mention a few of the many incidents.

23 December 1527. The Pope gave to the King a dispensation for marriage with Anne Boleyn, provided his marriage with Katharine was declared void;[3] and this promise was repeated in another bull (13 April 1528), by which Clement granted on the same condition a dispensation to Henry to marry whom he chose.[4]

[1] Brewer, ii. 188; Acton, p. 17. [2] Brewer, ii. 189.
[3] Ehses, i. p. 14. [4] Ibid., p. 33; *E.H.R.*, 19 July 1890, p. 544.

Then comes what was apparently a decisive step. There was a stormy interview between the English ambassador and the Pope, Gardiner pressing the Pope to grant a commission, the Pope falling back on all sorts of subterfuges to avoid a decision which might give offence to the Emperor—he must be ruled by the lawyers who objected to Henry's demands, and although it was a saying of the canonists that the Pope had all laws locked up in the cabinet of his heart, to his misfortune he must confess that God had never given him the key wherewith to unlock it. Finally the Pope yielded and issued a bull granting a commission to Wolsey and Cardinal Campeggio to hear and determine all matters concerning the King's marriage and the dispensation of his predecessors.[1] The Pope did more; he gave a promise [2] to do nothing which would obstruct the full execution of the commission. But again there was disappointment and delay—delay due to all concerned—delay owing to the efforts of Wolsey to get the Pope to declare the brief of Julius II a forgery, the efforts of the Emperor to move the case from England, and the irresolution of the Pope. Campeggio, who knew that his master did not want expedition, did not arrive in London until late in the year 1528. In October he was writing that he could not persuade the Queen to yield and to consent to enter a religious house, and that he thought that the Pope himself should determine the question.[3] In fact Campeggio did his best to spin out the proceedings; not until the 31st May 1529 was

[1] Ehses, i. p. 28; J. S. Brewer, *Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII*, 1837, seq.; Friedmann, i. 68: Pocock, i. 167. As to discrepancy in date see Ehses, in *Historisches Jahrbuch* (Bonn), 1888, pp. 37, 245.

[2] 23 July 1528; Ehses, p. 30.

[3] Ehses, i. p. 59; *Historisches Jahrbuch*, 1892, p. 476.

held the first sitting of the Legatine Court in the Parliament Chamber of the Blackfriars.[1]

At the first meeting (31 May), which was formal, the court was opened and the bull appointing the commission was read. The real proceedings began on the 21st of June. Both the King and Queen were present with their counsel. I give Burnet's account of what took place:

'When the king and queen were called on, the king answered, *Here*; but the queen left her seat, and went and kneeled down before him, and made a speech, that had all the insinuations in it to raise pity and compassion in the court. She said, "She was a poor woman, and a stranger in his dominions, where she could neither expect good counsel, nor indifferent judges; she had been long his wife, and desired to know wherein she had offended him: she had been his wife twenty years and more, and had borne him several children, and had ever studied to please him; and protested he had found her a true maid, about which she appealed to his own conscience. If she had done anything amiss, she was willing to be put away with shame. Their parents were esteemed very wise princes, and no doubt had good counsellors, and learned men about them, when the match was agreed: therefore she would not submit to the court; nor durst her lawyers, who were his subjects, and assigned by him, speak freely for her. So she desired to be excused till she heard from Spain." That said, she rose up, and made the king a low reverence, and went out of the court. And though they called after her, she made no answer, but went away, and would never again appear in court.'[2]

This, I may remark, is the scene which Shakespeare describes, repeating the speech which I have quoted almost verbatim. He adds, however, some touches which may not be wholly imaginary:

[1] J. Lingard, *History of England* (1837–9), vi. 149; Burnet, iii. 120; see Pocock, i. 206, as to directions for proceedings in Divorce Court from 18 May to 27 July 1529.

[2] Burnet, i. 129.

Queen Katharine. Lord Cardinal,
To you I speak.
Wolsey. Your pleasure, Madam?
Queen Katharine. Sir,
I am about to weep; but, thinking that
We are a queen, or long have dream'd so, certain
The daughter of a king, my drops of tears
I'll turn to sparks of fire.
Wolsey. Be patient yet.
Queen Katharine. I will, when you are humble; nay, before,
Or God will punish me. I do believe,
Induced by potent circumstances, that
You are mine enemy, and make my challenge
You shall not be my judge; for it is you
Have blown this coal betwixt my lord and me;
Which God's dew quench! Therefore I say again,
I utterly abhor, yea, from my soul
Refuse you for my judge; whom, yet once more,
I hold my most malicious foe and think not
At all a friend to truth.[1]

The proceedings took the usual course in an ecclesiastical case. Articles alleging certain facts were prepared and were put to Henry and Katharine to be answered.[2] The Queen was cited to appear, and, not appearing, was pronounced contumacious. There was one striking incident. Fisher, Bishop of Rochester, intervened in the sitting of the 28th, and declared that as the result of two years' study and to avoid the damnation of his soul, in his opinion the marriage could not be dissolved by any power divine or human, and in maintenance of this opinion he was willing to lay down his life. In much the same strain spoke Standish, Bishop of St. Asaph.

The bull and brief were put in evidence. Objections

[1] *Henry VIII*, Act II, Scene iv.
[2] Pocock, i. 225; *State Trials*, i. 318 ff.

to the validity of both were delivered to the King's proctor to be answered by him. Dr. Taylor was appointed, after the manner of ecclesiastical courts, to take evidence respecting the circumstances of Prince Arthur's and King Henry's marriages, and such evidence was taken at great length. But again came a hitch in the proceedings. The Pope, who had received Katharine's appeal and was pressed by the Emperor to stop the proceedings, wrote to Wolsey that he could not well deny Katharine's right of appeal.[1] Campeggio took the hint, and on the very day appointed for ending the suit (23 July 1529) pressed for an adjournment to the 1st of October on the ground that, according to the usage of the Court of Rome, which he was bound to follow, the long vacation had begun.[2] On that day the court sat for the last time, Campeggio declaring that judgement must be deferred until proceedings had been laid before the Pope. The pressure of Spain and of the Emperor had proved effectual, and on the 15th July 1529 came the avocation of the cause to Rome.[3]

Then ensued a long pause, followed, as we shall see, by a rapid development of events. The King was much engaged during 1530 and 1531 in procuring everywhere opinions favourable to his views as to the marriage. This he did, notwithstanding that the Pope[4] had forbidden under heavy penalties, judges, advocates, &c., to give opinions in the matter. The Pope's position had now become clear and definite, and it was one of hostility to Henry. Since his treaty with the Emperor at Barcelona[5] the Pope no longer hesitated. He signed an avocation to himself of the cause. He commanded the King to marry

[1] 8 July 1529; Pocock, i. 249. [2] Friedmann, i. 93.
[3] Ehses, i. p. 121. [4] 21 May 1530. [5] 3 July 1529.

no one until the suit was determined and meantime to treat Katharine as his lawful wife,[1] and requested him to put away Anne Boleyn.[2] On the 5th January 1531 the Pope cited Henry to appear before the Rota and Consistory at Rome. On the 15th November 1532 came a threat of excommunication unless the King put away Anne and took back Katharine.

The crisis was fast approaching. Henry was succeeding in making, or appearing to make, his cause to be the national cause, for in July 1530 there was a declaration by Parliament to the Pope that 'the cause of his most sacred Majesty was the cause of us all'.[3] In 1531 there was a deputation of peers to Katharine pressing her to consent to her case being disposed of at a neutral place,[4] a request which she met with refusal. In the same year she was visited by another deputation urging her, if she would not allow the case to be tried at Cambrai, to permit it to be tried by a commission of English bishops and lawyers. Again a refusal on her part; 'English judges', she replied, 'would say black was white.'[5] Then Convocation intervened, and on the 5th April 1533 declared its opinion adverse to the marriage.[6]

Threats by one party were met with defiance by the other. From that point things moved swiftly and inevitably to a breach.

In the same year was passed the Act of Appeals putting an end to the Papal jurisdiction in England. Attempts were made by the King's agents at Rome to avert a conflict, but to no purpose; there were offers to refer the matter to the Archbishop of Canterbury or to a commission nominated by the Emperor, the French

[1] Pocock, ii. 104. [2] Ibid., p. 166. [3] Ibid., i. 430.
[4] Froude, p. 159. [5] Ibid., p. 176. [6] Pocock, ii. 446.

King, Henry, and Cranmer. They were declined. Then a bold, I might say revolutionary, step was taken. Cranmer asked to be allowed to act as judge in the matter.[1] He received permission; and with three bishops as assessors he held a court at Dunstable to try the case.[2] He cited the Queen to appear before him. She objected, and rightly so, to his jurisdiction;[3] he declared her contumacious for non-appearance, and, as 'archbishop of Canterbury, primate of all England and legate of the apostolical see', pronounced the marriage of Henry with Katharine null and void.[4]

The answer from Rome came quickly. On the 11th June 1533 was pronounced the Pope's definitive sentence declaring the marriage with Anne Boleyn null and void, and that Henry had incurred the penalty of greater excommunication.[5]

A bull was issued[6] declaring valid the marriage of Henry and Katharine, the King to be excommunicated if he disobeyed. Two days after[7] there was judgement by the Pope with the consent of the cardinals assembled in consistory that the marriage was valid and declaring that the King was bound to take Katharine back.[8]

For Katharine the victory at Rome was small consolation; she did not long survive her defeat in England. Knowing that she was dying, she wrote to Henry a letter in words which reveal her nature:

'My most dear Lord, King, and Husband. The hour of my death now approaching, I cannot chuse, but out of love I bear you,

[1] Friedmann, i. 201; 11 April 1533.
[2] Ibid., p. 204; Burnet, i. 219; 1 *State Trials*, p. 358; 10 May 1533.
[3] 30 April 1533. [4] 23 May 1533.
[5] Pocock, ii. 677. [6] 23 March 1534. [7] 25 March 1534.
[8] 1 *State Trials*, 363; Pocock, ii. 532.

advise you of your soul's health, which you ought to prefer before all considerations of the world or flesh whatsoever. For which yet you have cast me into many calamities, and yourself into many troubles. But I forgive you all; and pray God to do so likewise. For the rest I commend unto you Mary our daughter, beseeching you to be a good father to her, as I have heretofore desired. I must intreat you also, to respect my maids, and give them in marriage, which is not much, they being but three; and to all my other servants, a year's pay besides their due, lest otherwise they should be unprovided for. Lastly, I make this vow, that mine eyes desire you above all things. Farewell.' [1]

The royal monster of egotism had the art of extracting from his victims the last drop of devotion. In a few hours after writing the letter she was dead.

I pause to sum up some of the impressions left by a study of the trial. And first as to the main question in dispute, the dispensing power of the Pope, there was no clear opinion as to the merits of the controversy. Some alleged that the practice was wholly new, resembling the system of sale of indulgences which had caused discontent and resistance in Germany.[2] New in a sense it probably was; but for reasons which I have already stated, the tendency was to widen the range of the Pope's dispensing powers. Popes had repeatedly shown themselves accommodating in these matters. Both the husbands of Henry's sister Mary had been divorced with the Pope's approval. So, too, was his sister Margaret. Pope Alexander VI had granted a similar dispensation to Emmanuel of Portugal.[3] In the light of the facts revealed in the controversy as to Katharine's marriage, the notion that in all Europe there was a uniform law of marriage strictly carried out does not bear examination. On the contrary, there was,

[1] 1 *State Trials*, 368.

[2] Acton, *Lectures on Modern History*, p. 137. [3] Ibid.

especially in the marriages of Princes, a marvellous amount of irregularity and looseness, which the council of Trent did something to remove.

To name a second impression left by the proceedings, one cannot but be struck by the weight given to the opinion of the Universities. The law faculties stood in the position of the jurisconsulti at Rome. This was natural. The courts being distrusted, the ecclesiastical judges being under the influence of the Pope, and the secular judges being, with rare exceptions, subservient to the King, the only mode of eliciting a disinterested opinion was to consult the Universities and jurists. Whether they were entirely disinterested and impartial is more than doubtful, but at all events their partiality was less obvious. Further, the courts and judges were not regarded as the only mouthpieces of law; not issuing, it was supposed, from a definite central source, but viewed rather as a vague floating mass of opinion, the law might be expounded, as is international law to-day, by experts.

My final observation on the entire proceedings is that they illustrate the ascendency which the canon law had acquired in England. Professor Maitland has pressed this point and supported it by arguments drawn from Lyndwood, the English writer on canon law.

'Kings and Parliaments and secular justices', says Maitland, 'had it in their power to narrow the province of the law ecclesiastical, and might hedge it round about with writs of prohibition which, as a matter of fact, the bishops and their officials would not transgress; but it was not for kings or parliaments or secular justices to make or to declare the law of the church, or to dictate the decisions of the church's courts.' [1]

None of his arguments, it seems to me, is so strong as

[1] F. W. Maitland, *Roman Canon Law in the Church of England*, p. 81.

some of the facts in these proceedings, in particular the spectacle of an English King in his own country cited before the court of the legates of the Pope, appearing therein as if a subject and answering charges made against him. It was going to Canossa, as no other English sovereign before or since, and not the less because Henry sought to gain his personal ends thereby.

I do not know whether Brewer is right in saying that the spectacle of this incongruity shocked the nation, and that 'no single act was more effective in hastening on the consummation of the next few years, or perhaps did more to reconcile men's minds to Henry's assumption of supremacy'.[1]

And this leads me to name the final impression which I carry away. No one in those days assumed that courts would act fairly and squarely. Every one assumed, on the contrary, that personal or political objects would chiefly determine results. Often in the course of these lectures I have had occasion to point out that the early trials which I have described show the existence of a low standard of justice. By few proceedings is this better illustrated than by those against Katharine.

Once again, and not for the last time, the courts proved themselves the pliant and handy instruments of injustice.

[1] Brewer, *Henry VIII*, ii. 344.

IX. SIR WALTER RALEIGH

I COME to the trial, the long imprisonment, and the execution of one of the most gifted of Englishmen; a trial marked from first to last by injustice and crime, clothed—scantily clothed—in judicial forms; not an act done hastily in times of excitement, but deliberately carried out in cold blood. It is criminal procedure seen at its worst. You may have visited an old prison and the loathsome dungeons in which men were confined and seen the instruments of torture to which they were subjected. The feeling inspired by such a visit is much the same as that excited by the perusal of the proceedings in this case.

Who was most at fault? Who appears in the worst light? the King, the prosecution, the counsel, the judges, the jury?—the King, or Coke, or Chief Justice Popham, or Lewis Stuckeley, the betrayer of Raleigh? It is scarcely possible to say. Upon all rests some share of infamy, those not excepted from whom better things might be expected. The name of Coke is soiled by his behaviour in the first part of the proceedings; that of Bacon is stained by his responsibility for the proceedings which led to the revival of proceedings for fifteen years suspended and to Raleigh's execution.

I do not attempt a biography of Raleigh; but I must advert to the infirmitiesand strength of a character which dazzled men, but did not inspire affection, for in it, partly, lies the explanation of his fate. The admirable Crichton of an age in which versatility was common, the cynosure of all that was great and noble and varied, he exhibited a rare union of faculties generally incompatible;

scholar, thinker, explorer, poet, sailor, man of action; statesman and adventurer; fluent orator, accomplished courtier, man of letters; perhaps in the plenitude of his many gifts the greatest of the Elizabethans. I think of Alcibiades, as Plutarch describes him, or Leonardo da Vinci. I find no equal to him in his many-sidedness and endless accomplishments. When we think of a typical Elizabethan we think of Raleigh. He had his defects, by no means invisible to his contemporaries. Indeed, he seems to have been one of the best hated men of his time. Essex called him a fox.[1] Perhaps he was shifty. Aubrey says that he was 'damnable proud'. He did not suffer fools gladly, and he was restless and ambitious. He had many enemies—bitter enemies—among his countrymen. He had grave faults. He was cruel in war and a ruthless conqueror; he was merciless to the Irish; not refraining from piracy; ambitious; not making friends; craftily obsequious in speech; proud as Lucifer; but, as is so often the case with surpassing versatility, he accomplished less than inferior men. There was in him an element of instability. His path was strewed with projects unaccomplished. Regarded as a man of action and a statesman he was a magnificent failure. In his days of prosperity the evil side of his nature was prominent; he was at his best in adversity. His demeanour at his trial touched even his enemies. His speech on the scaffold made him, who had been one of the most unpopular of men, endeared to his countrymen. Nothing in his life became him like the leaving of it.

This is not a biography of Raleigh. As little is it one of Coke, who conducted the prosecution, or of Cobham who accused Raleigh of complicity in treason and of a share

[1] W. Stebbing, *Sir Walter Raleigh*, p. 150.

in the Main plot or Bye plot, and whose vacillations and confessions and retractations made everything he said worthless. But the character of all three must be before you, if you are to bring back the trial. Here in this case there is a strange antagonism—the narrow-minded, pedantic, acute Coke, seeking to destroy Raleigh whom he hated with all the intensity of a small and narrow mind.

I pass to the trial, which took place in the old episcopal palace, Wolvesey Castle, at Winchester, on the 17th November 1603.

Raleigh had been suddenly arrested on the terrace of Windsor Castle while he was walking up and down waiting to ride out with the King. After the manner of the time he was examined by the Privy Council in the Council Chamber.[1] So far as I know there is no record of that examination ; we know of it only incidentally from statements in the course of the trial. The trial took place before a special commission consisting of the Earl of Suffolk, the Earl of Devonshire, Lord Cecil, Lord Wotton, the Vice-Chamberlain, the Lord Chief Justice of the King's Bench, the Lord Chief Justice of the Common Pleas, and two puisne judges, Sir W. Wade and Lord Henry Howard. They included some of Raleigh's enemies, among whom one may certainly name Lord Henry Howard and Cecil. As we now know from documents which have come to light, they[2] had sedulously sought by secret correspondence to poison King James's mind against Raleigh. The lay judges were not mere assessors or ornamental members of the commission, as is the case with those whose names are now put in the Commission of Assize. They took, as we shall find, an active part in the proceed-

[1] Sometime between 12 July and 16 July 1603.

[2] E. Edwards, *The Life of Sir Walter Raleigh*, i. 324–9.

ings. The judges were not likely to take care that the prisoner received a fair trial. The Chief Justice Popham had lived in his youth a wild life. According to one report, probably not true, he had taken purses as a highwayman on Black Heath. He was a courtier and was not likely to stand up for the rights of a prisoner obnoxious to the Court. The counsel were Coke, Hele, and Philips; the first anxious to prove to the new sovereign his zeal and fidelity.[1] The indictment in form was much the same as that in use to-day. How this form originated, when or how the indictment took its present shape, I am not aware; I have looked into the books and have failed to find any key to a problem which must be solved before the history of procedure in criminal law is elucidated. The probability is that it was derived at once from the presentments of juries and the forms in use in ecclesiastical courts. But I do not speak with certainty. In this case the indictment was that Raleigh 'did conspire, and go about to deprive the king of his Government, to raise up Sedition within the realm, to alter religion, to bring in the Roman Superstition, and to procure foreign enemies to invade the kingdom'.

The overt acts alleged against Raleigh were these:

'that the Lord Cobham, the 9th of June last, did meet with the said sir Walter Raleigh in Durham-house, in the parish of St. Martin's in the Fields, and then and there had conference with him, how to advance Arabella Stuart to the crown and royal

[1] 'As soon as he was made a Judge, he became aware of limitations to the Royal Prerogative which he would never have found out while he was Attorney-General. As soon as he ceased to be a Judge and became a popular leader in the House of Commons, he began to see that the impartiality of the Bench needed for its protection cautions and restraints of which he never felt the want while he sat on it himself.' J. Spedding, *The Letters and the Life of Francis Bacon*, v. 115.

throne of this kingdom; and that then and there it was agreed, that Cobham should treat with Aremberg, embassador from the archduke of Austria, to obtain of him 600,000 crowns, to bring to pass their intended treason. It was agreed that Cobham should go to the archduke Albert, to procure him to advance the pretended title of Arabella: from thence knowing that Albert had not sufficient means to maintain his own army in the Low Countries, Cobham should go to Spain to procure the king to assist and further her pretended title.—It was agreed, the better to effect all this Conspiracy, that Arabella should write three Letters, one to the archduke, another to the king of Spain, and a third to the duke of Savoy, and promise three things:—1. To establish a firm Peace between England and Spain. 2. To tolerate the Popish and Roman superstition. 3. To be ruled by them in contracting of her Marriage.—And for the effecting of these traiterous purposes, Cobham should return by the isle of Jersey, and should find sir Walter Raleigh, captain of the said Isle, there, and take counsel of Raleigh for the distributing of the aforesaid crowns, as the occasion or discontentment of the subjects should give cause and way.—And further that Cobham and his brother Brook met on the 9th of June last, and Cobham told Brook all these Treasons: to the which Treasons Brook gave his assent, and did join himself to all these. And after, on the Thursday following, Cobham and Brook did speak these words; "That there would never be a good world in England, till the King" (meaning our sovereign lord) "and his cubs" (meaning his royal issue) "were taken away."—And the more to disable and deprive the king of his crown, and to confirm the said Cobham in his intents, Raleigh did publish a Book, falsely written against the most just and royal Title of the king, knowing the said Book to be written against the just Title of the king; which Book Cobham after that received of him. Further, for the better effecting these traiterous purposes, and to establish the said Brook in his intent, the said Cobham did deliver the said Book unto him the 14th of June. And further, the said Cobham, on the 16th of June, for accomplishment of the said Conference, and by the traiterous instigation of Raleigh, did move Brook to incite Arabella to write to the three forenamed

princes, to procure them to advance her Title; and that she after she had obtained the crown, should promise to perform those things, viz., 1. Peace between England and Spain. 2. To tolerate with impunity the Popish and Roman Superstitions. 3. To be ruled by them three in the contracting of her marriage. To these motions the said Brook gave his assent. And for the better effecting of the said Treasons, Cobham on the 17th of June, by the instigation of Raleigh, did write Letters to Count Aremberg, and did deliver the said letters to one Matthew de Lawrency, to be delivered to the said count, which he did deliver, for the obtaining of the 600,000 crowns; which money by other Letters Count Aremberg did promise to perform the payment of; and this Letter Cobham received the 18th of June. And then did Cobham promise to Raleigh, that when he had received the said money, he would deliver 8,000 crowns to him, to which motion he did consent; and afterwards Cobham offered Brook, that after he should receive the said crowns, he would give to him 10,000 thereof; to which motion Brook did assent.' [1]

The indictment was opened by Hele, notable it is said, as a brawler, a buffoon, and a money-lender.[2] He did not confine himself as is usual to-day to merely summarizing the pleadings, but made a short speech. The case for the Crown was then stated by Coke in a speech probably unsurpassed in a court of justice for downright ruffianism. I find it unequalled even in the proceedings of the French Revolutionary Trials at their worst. The proceedings largely consisted of a duel of words between Coke and the prisoner;[3] Coke bursting out in such transports of rage as these:

'Nay, I will prove all: thou art a monster; thou hast an English face but a Spanish heart. Now you must have money:

[1] 2 *State Trials*, p. 1.

[2] Edwards, i. 387; Lord Campbell, *Lives of the Chancellors*, ii. 333–5.

[3] 'I would not have made Sir Edward Coke's speech against Sir Walter Raleigh to gain all Coke's estates and reputation.' Lord Mansfield.

Aremberg was no sooner in England (I charge thee, Raleigh) but thou incitest Cobham to go unto him, and to deal with him for Money, to bestow on discontented persons, to raise Rebellion on the kingdom.

Raleigh. Let me answer for myself.

Coke. Thou shalt not.

Raleigh. It concerneth my life . . .

Coke. All that he did was by thy instigation, thou viper; for I " thou " thee, thou Traitor . . .

. . . . . .

Coke. Go to, I will lay thee upon thy back, for the confidentest traitor that ever came at a bar. . . . Thou art the most vile and execrable traitor that ever lived.

Raleigh. You speak indiscreetly, barbarously, and uncivilly.

Coke. I want words sufficient to express thy viperous treasons.

Raleigh. I think you want words indeed, for you have spoken one thing half a dozen times.

Coke. Thou art an odious fellow, thy name is hateful to all the realm of England for thy pride.'

To establish the charge against Raleigh it was necessary to prove that Cobham had done what was alleged, and to bring home to Raleigh knowledge of his actions and designs and assent thereto. I cannot say that either point was made good. Statements in depositions are so mixed up in the report with asseverations of counsel that it is hard to say what was put forward as evidence in this fierce duel between Coke and the prisoner. But this much is clear—no witness was called before the court.

I come to the evidence. I use that term for want of a better. But according to our rules there was none. A Judge in modern times must have directed the acquittal of the prisoner. No one was called to speak to what he saw or heard. No one was cross-examined except indeed the prisoner. The contents of written documents were spoken to without the originals being produced or their

absence explained. Even the Judges gave evidence—as it turned out, most important evidence. Confessions by A were admitted as conclusive evidence against B. Such evidence as there was consisted of the depositions of the examination of Cobham [1] in which he confessed that he had communication with Count Aremberg, Ambassador of the Archduke, and that he would never have so acted but for Raleigh's instigation. One of the depositions of Cobham's evidence was not signed by him. As to this the Chief Justice intervened with an astonishing statement.

'I came to the Lord Cobham, and told him he ought to subscribe; which presently after the Lord Cobham did. And he said of Sir Walter Raleigh in the doing it, "That wretch!" "That traitor Raleigh!" And surely the countenance and action of my Lord Cobham much satisfied me that what he had confessed was true, and that he surely thought that Sir Walter Raleigh had betrayed him.' [2]

The account in the *State Trials*, ii. 12, differs somewhat from the above. In a no less remarkable manner one of the judges came to the aid of the prosecution. The foreman of the jury wanted to know 'the time of Sir Walter Raleigh's first letter and of the Lord Cobham's accusation'.[3] Whereupon one of the judges, Lord Cecil, made a statement, not perhaps an answer to the juryman's question, but calculated to damage Raleigh.

That Cobham was guilty of participation in some plot is probably true; he admitted as much; that was common to all his varying and conflicting confessions. But of Raleigh's complicity in any plot there was practically no evidence except his admission that 'Cobham offered him 8000 crowns, which he was to have for the furtherance of the peace between England and Spain, and

[1] 20 July. [2] Edwards, i. 403. [3] Ibid., p. 404.

that he should have it within three days. To which he said, he gave this answer, "When I see the Money, I will tell you more": for I had thought it had been one of his ordinary idle conceits, and therefore made no Account thereof'.[1] But that Raleigh knew of the purpose for which the money was to be used, there was no evidence. He had listened to talk which he as a shrewd politician may have suspected had a treasonable significance. Of actual participation there was no proof except the assertions of Cobham, who said and unsaid things against Raleigh.[2]

There was one obvious objection to the conviction. Raleigh took exception to the proceedings, as not being in conformity with 1 Ed. VI, which said, 'No man shall be condemned of treason unless he be accused by two lawful accusers' and the 5th and 6th Ed. VI, which added that these accusers 'must be brought in person before the party accused at his arraignment, if they be living.' Raleigh pressed this point. 'My lords, I claim to have my accuser brought here face to face to speak. I beseech you, my Lords, let Cobham be sent for.' 'If you proceed to condemn me by bare inferences, without an oath, without a subscription, without witnesses, upon a paper accusation, you try me by the Spanish inquisition. If my accuser were dead or abroad, it were something; but he liveth, and is in this very house.'[3] He was unjust to the

[1] 2 *State Trials*, p. 17.

[2] As Spedding says, 'he had at least listened to an offer of a large sum of money—certainly Spanish, and therefore presumably in consideration of some service to be rendered to Spain.' Spedding, iii. 134. See *Edinburgh Review*, April 1840, p. 63; D. Jardine, *Criminal Trials*, i. 516–18.

[3] Ibid., pp. 418–19.

'*Raleigh.* Let my accuser come face to face and be deposed.

Attorney. The law presumes a man will not accuse himself to accuse another.' (2 *State Trials*, p. 19.)

Spanish inquisition ; its procedure would have been more regular and fairer. His request was refused ; and the Chief Justice ruled against him on the point of law, holding that the statutes had been repealed by 1 and 2 Philip and Mary. This ruling is not at all satisfactory ; the repeal, if there was a repeal, was only by implication ; and I may add, what is little to Coke's credit, that in his Institutes[1] he expressly states that the provisions of 1 Ed. VI were not repealed.[2] The rest of the so-called evidence consisted of extracts from ' declarations ' or ' confessions ' by Copley, Watson, and Brooke, who had been found guilty of treason. To show the loose sort of talk admitted I quote an extract from the examination of Copley : ' Also Watson told me, that a special person told him, that Aremberg offered to him 1,000 crowns to be in that action ; and that Brook said, the stirs in Scotland came out of Raleigh's head.' In fairness I ought to say that in refusing to call Cobham and in admitting these written statements the Court was following the usual practice, which was not to call witnesses for the Crown, but to put in the examination before the Privy Council.[3]

The evidence in support of the counts in the indictment based on the alleged publication of a book written against James's title to the Crown was, if possible, more ridiculous

' *Raleigh.* The common trial of England is by Jury and witnesses.

L. C. J. No, by examination ; if three conspire a treason, and they all confess it ; here is never a witness, yet they are condemned.

Justice Warburton. I marvel, Sir Walter, that you being of such experience and wit should stand on this point ; for so many horse-stealers may escape, if they may not be condemned without witnesses.' (2 *State Trials*, p. 18.)

[1] 3 Inst. 24–7.

[2] See Sir M. Foster, *A Report of some proceedings*, &c. (1762), p. 235.

[3] e.g. 1 *State Trials*, 1344–8.

than that in support of the other counts. The only proof forthcoming was an extract from Cobham's examination in which he said :

'I had from Raleigh a book written against the title of the King. I gave it to my brother. Raleigh said it was foolishly written. . . .
Raleigh. I never gave it him. He took it off my table.' [1]

Raleigh proceeded to say how he got it from a certain Councillor's library. Pressed to say what Councillor, Raleigh replied : 'From my lord Treasurer Burghley' ; whereupon Lord Cecil entered into a long explanation the effect of which was to make out as strong a case—that is none at all—against Cecil as against Raleigh.[2]

The reports of the trial give no indication whether or not the Lord Chief Justice charged the jury. In fact I am not sure whether it was then customary for the judge to charge the jury in the sense of examining the evidence. But after the conviction he delivered a long unbridled tirade against Raleigh charging him with eager ambition and corrupt covetousness and insinuating that he entertained 'the most heathenish and blasphemous opinions'.

The whole behaviour and demeanour of the Judge remind one of the description by Bunyan of the trial of Faithful in Vanity Fair, Lord Hategood presiding.

'When this Pickthank had told his tale, the judge directed his speech to the prisoner at the bar, saying, Thou runagate, heretic, and traitor, hast thou heard what these honest gentlemen have witnessed against thee?
Faithful. May I speak a few words in my own defence?
Judge. Sirrah! Sirrah! thou deservest to live no longer, but

[1] 2 *State Trials*, p. 20. [2] Jardine, i. 430.

to be slain immediately upon the place; yet, that all men may see our gentleness towards thee, let us hear what thou, vile runagate, hast to say . . .

Then the judge called to the jury (who all this while stood by to hear and observe:) Gentlemen of the jury, you see this man about whom so great an uproar hath been made in this town. You have also heard what these worthy gentlemen have witnessed against him. Also you have heard his reply and confession. It lieth now in your breasts to hang him or save his life. . . . Now the substance of these laws this rebel has broken, not only in thought, (which is not to be borne,) but also in word and deed, which must therefore needs be intolerable . . . for the treason that he hath confessed, he deserveth to die the death.'

You know how the trial ended in a conviction by a subservient jury; how the popular feeling at first against him turned in his favour.

'When Raleigh first came down, the city, in full swing of admiration for the new king, had even pelted him with tobacco-pipes; when the trial had run its course, the citizens, who after all may have had some love of fair play, turned round and showed by signs unmistakable that their sympathies had passed from the monarch to his victims.' [1]

You know too how, condemned to death, Raleigh was at the last moment respited. For twelve years he was confined to the Tower, spending his solitude in literary work and composing among other books *The history of the world*; a work equally original in design and execution; a work to which there had been nothing in any way similar except perhaps Augustine's *Civitas Dei*, and to which there was to be nothing in any way like until Bossuet's *Philosophy of History*.

You doubtless remember the rest of Raleigh's eventful

[1] G. W. Kitchin, *Historic Towns, Winchester*, p. 183. 'He went to his trial a man so unpopular that he was hooted and pelted on the road; he came out an object of general pity and admiration.' Spedding, iii. 134.

life, romantic and varied to the last; how the King was induced to release him in March 1616 and to grant him a commission to proceed to South America; how he set out with a fleet of twelve sail; how he failed to find the mine, or indeed any mine; how he got into trouble with and attacked the Spanish inhabitants; and how, when the disastrous expedition returned to Plymouth, Sir Lewis Stuckely seized him by orders of the King and in pursuance of a royal proclamation condemning and expressing 'utter mislike and detestation of the said insolencies and excesses'; [1] how with the connivance of Stuckely he endeavoured to escape and was treacherously arrested by Stuckely. He had violated his instructions; he had promised to 'break no peace; invade none of the Spanish towns': 'We will only trade with the Indians, and see none of that nation, except they assail us'.[2] His life was to be forfeit if he failed: 'When God shall permit us to arrive, if I bring them not to a mountain (near a navigable river) covered with gold and silver ore, let the commander have commission to cut off my head there.' [3] He was prepared to stake his life on the success of the enterprise.[4] Not only in small but in great matters he had transgressed the terms of his commission. It 'limited him to places possessed and inhabited by heathen and savage people; he sent his men to a place which he knew to be possessed and inhabited by Spaniards. He pledged himself not to hurt any subject of the King of Spain; he sent his men up the river with instructions to fight any Spanish force which they could be sure of defeating'.[5] He had acted, in short, as men did in Elizabeth's time; e.g. as Drake did—when a blow struck at Spain was always deemed fair. Upon his

[1] Spedding, vi. 354. [2] Ibid., vi. 343 *n*. [3] Ibid.
[4] Ibid., vi. 345. [5] Ibid., vi. 350.

being lodged in the Tower a commission consisting of Abbott, Bacon, Worcester, Caesar, Naunton, and Coke was appointed to examine and report upon the case. The Council was not content with questioning him several times. It employed underhand means to extract from him admissions.

On the 9th September the Council instructed Sir T. Wilson to go to the Tower to take charge of him and to remain constantly in his company, to suffer no person to have access to him or to speak to him except in his hearing, and to communicate to them anything that occurred worth notice—in other words, he was to worm out of Raleigh any secrets. Wilson seems to have done his work with zeal. Some of the reports which this spy wrote to the King have been preserved. They contain such sentences as these: 'Hopes he will gain ground of the hypocrite, the best comfort being that he will not long be troubled with him.'... 'Has done his best to work out what he could from this arch-hypocrite.'... 'Has not been so indiscreet as to promise Raleigh any favour, as on authority from his Majesty; but has merely used the hope of mercy as a bait, being the only one that could draw him on to confess anything.'[1]

The commissioners sent in their report on the 18th of December. They recommended that if Raleigh was to be executed, 'in respect of the great effluxion of time since his attainder and of his employment by your Majesty's commission', a narrative of his late crimes should be published. Alternatively, i.e. 'that where your Majesty is so renowned for your justice, it may have such a proceeding as is nearest to legal proceeding; which is, that he be called before the whole body of your Council

[1] T. N. Brushfield, *Raleghana*, Part vii, 9.

of State, and your principal Judges.'[1] The King objected to these proposals; to the second because anything of the nature of a public examination 'would make him too popular, as was found by experiment at the arraignment at Winchester, where by his wit he turned the hatred of men into compassion'.

Was his execution legal? Raleigh had not obtained a pardon; which in strictness ought to pass under the great seal or be under the sign manual. He had not even obtained a conditional pardon. The judges who were consulted appear to have thought that he had not been pardoned by implication; the circumstance that he had received a commission investing him with large powers was not sufficient. Being civilly dead he could not be tried for his fresh offences. But they advised an inquiry similar to a trial. Mr. Spedding, always anxious to shield his hero, Bacon, says: 'The old sentence happened to stand in the way of a *trial* for the new offence: the lawyers did not know how a man under attainder for treason could be legally punished at all except by using the power which the attainder had put into the King's hands.'[2] But what was the new offence? Mr. Spedding says, 'the offence was an offence against the law of nations, and Spain was the nation injured',[3] or, as the matter is described in the Declaration or apology, 'great and heinous offences, in acts of hostility upon his Majesty's confederates, depredations, and abuses as well of his commission as of His Majesty's subjects under his charge, impostures, attempts of escape, declining His Majesty's justice, and the rest'.[4] Upon which two comments may

[1] Spedding, vi. 361–2.

[2] Ibid., vi. 437; see proceedings in K. B., Jardine, i. 500.

[3] Spedding, vi. 437.

[4] Ibid., p. 412.

be made. Raleigh was never specifically charged with such offences; and the King refused to permit any public inquiry into them; the examination must be in secret. The apologists for the King and Bacon, such as Mr. Spedding, are in this dilemma; if Raleigh was tried for his old offences, it was a cruel revival of offences committed fifteen years ago; if for a new offence the trial was of a kind unknown to English law. The fact was that he was sacrificed to the Spanish alliance, then deemed precious. The real nature of the transaction appears in the fact that James offered to deliver up Raleigh to Spain in order that he might be executed in Madrid,[1] an offer of a kind, so far as I know, unprecedented in the history of criminal law.

I return to the trial and would make some comments upon certain of its features. The discreditable circumstances of the trial and of all that followed would have been impossible but for the position and character of the judges at that time; a position of subservience which lasted with some bright exceptions until the Revolution. They were not independent. They were the King's servants. They might be dismissed at a moment's notice. They were to do his bidding, just as much as the King's butler or steward. They were free when his interests were not concerned, but unfortunately one never knew when they might be.

Mr. Luders's words on this subject,[2] though harsh, are not too strong:

'The Judges were so far from being a political or independent Order of the State, that they were only a part of the King's Household, of his moveable retinue; changed as often as any other part,

[1] Edwards, i. 676.

[2] A. Luders, *Considerations on the Law of High Treason*, ch. iv.

and from the same causes, the pleasure of the King, or designs of a minister. The Steward of a Court Baron and a Judge of the King's Courts, were in their institution persons in corresponding offices. Of such officers only could the rule, *Boni Judicis est ampliare jurisdictionem*, have passed for a maxim of duty. Their chief concern was to take care of the royal prerogative, and their characters and conduct necessarily corresponded with those of the Courtiers. . . . We find very few examples of a Judge venturing to declare his opinion, in a public cause, against the known wishes of the Crown. Changes in judicial places were as frequent as in any other department of the administration.' [1]

Both King and people viewed the judges in this light. The latter never looked up to them for protection, but the former looked down to them for obedience; such was the general estimate of them as a body of men. As individuals their behaviour was like that of other courtiers. This was particularly true of the judges in the reign of James I, with his ideas of autocracy,[2] when flattery of royalty and obsequiousness reached their height and many of the proudest bent the knee to things mean. The notorious Jefferies in his rough way said that 'most of the Judges were rogues'.[3] Jefferies was much given to overstatements. But Judge Hategood whom Bunyan describes in Vanity Fair was a real person. No doubt there were cases of judicial independence.[4] But these bright examples were exceptional; and I am inclined to think that there was a decadence in this respect. Mr. Holdsworth, in an interesting chapter relating chiefly to earlier times than those with which I am now concerned, gives examples of integrity and independence on the part of judges.

[1] Ibid., pp. 106–7.

[2] See Peacham's Case: the High Commission Case.

[3] Quoted by Henry, Earl of Clarendon, in his diary; Luders, p. 127.

[4] Homersham Cox, *The Institutions of the English Government*, p. 339 *n*.

Writing with reference to the period to which Fortescue's *De laudibus legum Angliae* relates (about 1450), he remarks that 'we find no such wholesale scandals as were rampant in the earlier part of Edward I's reign. Judges like Parning and Gascoigne and Markham and Fortescue had at least high ideals as to the sanctity of the law and the responsibilities of the bench. The books and the better class of judges set a high standard of judicial conduct; and even ordinary men cannot pass their lives in learning, and practising, and administering a system which teaches such doctrines without imbibing some of their spirit.'[1] It is, however, probable that at the time with which I am dealing things were on a downward grade.

The personal wishes of the King dominated. The medieval conceptions of law as something raised above sovereigns and courts and statutes, with a power of its own to which all rulers were subject, was gone or impaired. The King was supreme. When the exorbitant claims of the Tudor monarchs had reached their height it might be said that what the King desired was law. Even Fortescue, who extolled the majesty of the law, admits that 'there were occasions when it was right that it [the Crown] should interfere with the administration of the law in the interests of justice'.[2]

I touch an interesting but highly obscure point when I suggest that the position of English judges was at this time less secure than that of the French. The Parlements of France, i.e. the several high courts, with unlimited jurisdiction scattered over the country, had shown

[1] W. S. Holdsworth, *History of English Law* (3rd ed.), ii. 566.

[2] Ibid., p. 563; referring to *de Natura Legis Naturae* (ed. Clermont), i, c. xxiv: Not until 12 and 13 Will. 3, c. 2 (extended by 1 Geo. III, c. 23) was the position of judges secure.

themselves independent and made large claims not merely as to construing statutes, but also as to legislating. They had refused again and again to register certain laws which they believed to be unjustifiable. To quote M. Esmein on this point:[1] 'Ils se déclaraient les gardiens des *lois fondamentales* ou *principes fondamentaux de la monarchie*.'[2] No doubt there were limits to their powers of resistance; the Crown had the last word; if the King held a *lit de justice* he could have his own way.[3]

But this course was rarely taken. I find in the history of English law nothing corresponding to the persistent acts of resistance to the royal power shown by ministers of the French Parliaments, no general spirit of independence such as one reads of in France. The explanation of this is one of the paradoxes of history.

In early times there had been in England instances of judicial office being bought and sold.[4] But this practice had been stopped by 5 and 6 Ed. VI, c. 16. The judges were chosen from the body of sergeants; there was no open sale of judicial office. True, the practice went on secretly.

'Judicial offices were openly made the subject of bargain and sale. Henry Montague gave to Buckingham's nominee the clerkship of the court worth four thousand pounds a year. Coventry paid Coke two thousand angels for his influence in securing a judicial appointment. The chiefship of the Common Pleas cost Richardson seventeen thousand pounds. Sir Charles Caesar paid fifteen thousand pounds for the mastership of the rolls. Henry Yelverton gave the King four thousand pounds for the office of attorney-general—a place for which Ley, afterwards Chief-Justice, vainly offered ten thousand pounds. Judge Nichols refused to

[1] A. Esmein, *Cours élémentaire d'histoire du Droit français*, pp. 527–99.
[2] Ibid., p. 527.
[3] Ibid., p. 533.
[4] Cox, p. 336 (referring to Madox, i. 2 (2nd ed.)).

pay for his place, and James I always referred to him as "the Judge that would give no money".'[1]

But these irregular and illegal transactions did not have the good effects with which the open and lawful sale of judicial offices was attended in France. There at a very early date,[2] such offices became vendible and eventually hereditary. It was a practice which subsisted throughout France until the Revolution, and one which brought about some good results. Montesquieu justifies it.

'Cette vénalité est bonne dans les états monarchiques, parce-qu'elle fait faire comme un métier de famille ce qu'on ne voudroit pas entreprendre pour la vertu; qu'elle destine chacun à son devoir et rend les ordres de l'état plus permanents.'[3]

The system had a further consequence more directly beneficial.

'La vénalité produisit un résultat excellent, en ce qu'elle engendra l'inamovibilité des magistrats, qui, par là, s'introduisit dans notre pays et qui constitue la meilleure garantie pour le justiciable.'[4]

At all events the judge who openly bought his office for hard cash and who regarded it as freehold was likely to be much more independent than those who held their offices at the pleasure of the King.

I touch another delicate and obscure point as to the administration of justice at this time. How far was the judiciary uncorrupt? To what extent it was common for judges to take presents from suitors is a little uncertain. Bacon seems to assume that it was common. To the

[1] J. M. Zane, *The Five Ages of the Bench and Bar of England* (*Select Essays in Anglo-American Legal History*, i. 695).

[2] Probably about the reign of Charles IX. Esmein, p. 414.

[3] Montesquieu, *De l'Esprit des Lois*, Book V, ch. xix.

[4] Esmein, p. 418.

charges against him his answer was, as you know, 'the Lord Chancellor will make no manner of defence to the charge, but meaneth to acknowledge corruption, and to make a particular confession to every point, and after that a humble submission.' [1] His biographer and apologist, Mr. Spedding, discussing the question :—'What was the custom and what was the opinion with regard to gift-taking by Judges in those days? How far was the practice common, and how far was it tolerated? Had Bacon, in short, done more than other Chancellors had been in the habit of doing, and doing without reproach?'—says: 'If as searching a light could be thrown upon the proceedings of former Chancellors, I should not be surprised to find that the taking of gifts from suitors was one of those practices which, though everybody knew them to be illegal, and nobody would undertake publicly to justify them, were nevertheless not only generally indulged in by those who received the profit, but generally known and tolerated by others who had no share in it.' [2] Spedding cites the case of Sir Thomas More receiving without questions of conscience a silver flagon from a suitor. What More thought no crime others must have deemed legitimate. Had the cases of Bacon and Macclesfield passed unnoticed and unpunished, the practice of receiving épices might have become as common in England as in France.[3]

Remember, too, the position of jurymen in those days; they were liable in civil cases to be punished by writ of attaint,[4] which might mean that if they did not do the

[1] Spedding, vii. 250.

[2] Ibid., vii. 266.

[3] I might have had something to say, if time permitted, of the practice of obtaining opinions from the judges before the trial took place. See ibid., v. 114.

[4] Cox, p. 365 *n.*

political work expected of them they might fare badly. Such risk they ran not only in England but also in Scotland. I find instances of prosecutions of jurymen who had the courage to acquit the accused.[1] Not until Bushel's case did they vindicate their rights to give what verdict they thought fit.

Next, remember the imperfection of what is scarcely less important than independent and uncorrupt judiciary. I mean the existence of a body of advocates with large and well-defined rights. No such position belonged to lawyers at this time. They might not defend men charged with high treason, they dared not speak their minds except at the risk of professional disgrace. They had no right to appear in many cases which came before the courts. In these circumstances what security was there for a fair trial? If a judge in those days had frankly charged a jury according to the facts of the situation it would have been in some such terms as these: 'If you acquit the prisoner I shall be dismissed and you will go to prison. Consider your verdict.'

I have stated these considerations at some length, because without some such explanation the account of Raleigh's trial would appear barely credible. I state them also for another reason. When proposals are made, as they sometimes are, to make the position of the judiciary less secure than it is, we do well to recall the state of things

[1] The jury was fined in Throckmorton's Case, 1 *State Trials*, p. 901; Lilburne's Case, 5 *State Trials*, p. 445; Penn and Mead's Case, 6 *State Trials*, p. 967. In Pitcairn, *Criminal Trials in Scotland*, 1488–1624, i, Part 2, p. 244 (1591), there is an indictment or Dittay of John Mowbray and the majority of Jurors upon Barbara Naipar's assyse for wilful error in acquitting a witch because they did 'manifestly and wilfully err, contrary to the laws and practice of the realm; incurring thereby the horrible crime of perjury, *et penam temere iurantium super Assisam*'.

before their present tenure and the facts of Raleigh's trial as an example for all time of the effects of a dependent judiciary and bar, and a proof of the saying of Montesquieu : [1] ' Il n'y a point encore de liberté si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutrice.'

[1] Montesquieu, Book XI, ch. vi.

X. TRIALS FOR WITCHCRAFT

I TURN to an entirely different class of trial, quite unlike those which I have hitherto described. In them was generally present a political element; the State was somehow concerned; a conviction was thought essential for dynastic or State reasons. The alleged crime was a crime, something which we still regard as such. At the suggestion of some friends I have chosen examples of trials of a kind now obsolete. I mean trials for sorcery or witchcraft. They may not at first blush seem to possess interest or to be instructive as to the history of legal procedure. Such is not of course their chief interest. But they deserve, as I hope to be able to prove, to be studied by the lawyer and in connexion with procedure. They throw light on the value of rules of evidence. They prove in an impressive manner, and as no other trials could, the insufficiency and untrustworthiness of confessions, deemed by the canon law as the most convincing and only conclusive proof. They reveal defects in procedure regarded as means or as an instrument for eliciting truth. They show the liability of trial by jury to be abused in times of excitement. I must not, however, make too much of their value as elucidating the history of procedure. No doubt the main interest of such trials lies elsewhere. They are storehouses of folk-lore, of local usages, of facts interesting to the psychologist. I do not believe the retrospect entirely useless or a mere matter of curiosity to the lawyer. To the student of criminal law it is for several reasons edifying. In the ordinary books much is said of epidemic crimes, i.e. crimes which are

freely imitated ; crimes which, once become common, by this circumstance became still commoner. The prosecutions with which we are concerned belong to what for want of a better phrase I may call epidemic prosecutions ; a multitude of prosecutions for imaginary crimes ; one group of prosecutions engendering and facilitating another, and, strangest phenomenon, leading imaginary criminals very often to make imaginary confessions and even to feel remorse for offences never committed and impossible to commit. The epidemic brought about the cruel death of hundreds, nay thousands, of innocent persons, for the most part women ; many of them dying without the consciousness of innocence and inspiring the witnesses of their death with a feeling of hatred which no real crime called forth. The belief in witchcraft and sorcery is very widespread among savage tribes ; a belief in the magical powers of nature is a common mental stage in culture. But it is somewhat humiliating to admit that only 300 years ago educated Europe was in this respect in a lower condition than any part of savage Africa. No race of savages has, so far as I am aware, been so imbued with a belief in the omnipresence of witchcraft, none so domineered by witch-doctors and witch-finders as was the Scotland of Knox, the England of Shakespeare and Bacon, and the Germany of Albert Dürer and Luther. If I qualify that statement, it is by saying that nowhere, so far as I can find, has there been such an organization designed to search out and put down by cruel methods witchcraft and sorcery ; and that nowhere has there been discovered belief in so malignant a form of witchcraft and consequently none so calculated to excite hatred of its supposed professors and practitioners.

Even in the days when it was most prevalent the epi-

demic did not extend to all European countries. It was rare in the southern parts of Europe. It did not spread to Mohammedan populations, though, as is well known, forms of magic are prevalent there. It is significant that there is only one authentic instance of the burning of a witch at Rome in the fifteenth century,[1] that is at a time when they were being burnt by the hundreds in Germany and England.[2] In fairness I ought to add that the *Malleus Maleficorum*, the handbook of inquisitors, was compiled at Rome in 1489.

The epidemic for a time prevailed in both Catholic and Protestant countries. It raged in Protestant Scotland. It raged in Catholic Bavaria. Few presumed to question the basis of the superstition ; the wisest took for granted that the beliefs of the ignorant on this subject were in substance well founded. The movement went on alongside the Renaissance. If it was not fostered, it was not checked thereby. It was a modern epidemic.

Antiquity knew nothing of such outbursts of terrified ignorance.[3] It lasted from the fifteenth to the middle of the seventeenth century. It was probably at the height of its virulence at the end of the sixteenth century. The bulk of the prosecutions fall in European countries within a space of about 250 years, a period marked by great intellectual activity and by important scientific discoveries, a period embracing the beginning and the

[1] L. F. A. von Pastor, *Geschichte der Päpste*, i. p. 231.

[2] 'Real witch-burnings are unknown at the end of the sixteenth and in the seventeenth centuries,' N. Paulus, *Hexenwahn und Hexenprozess, vornehmlich im 16. Jahrhundert*, p. 260.

[3] It is true that the exercise of magic—black magic—was treated as a crime, partly owing to its supposed close connexion with poisoning. The XII Tables contain provisions directed against magic. Plin., *Nat. Hist.*, xxx. 3 ; Apuleius, *Apologia*, s. 47.

culmination of the Renaissance. What is the explanation of these two centuries at once of blindness and infatuation and of growing enlightenment?

No doubt one obvious cause was the fact that since the sixteenth century in several countries jurisdiction over witchcraft had passed to the secular courts;[1] it was no longer a merely ecclesiastical offence. The Inquisition had treated sorcery and witchcraft as forms of heresy, a conception to which Goethe gives expression in the second part of Faust when the Chancellor exclaims: 'They're heretics and wizard-captains! And town and country they corrupt.'[2] By and by, and especially about the sixteenth century, the secular Courts began to punish it. Thus in Germany the *lex Carolina* (1532) made it, where harmful, an offence punishable by the secular arm with death by fire.[3] No doubt this multiplied the prosecutions. The fact which I have stated is not a full explanation of the origin and spread of the epidemic at that period. It does not tell us why not merely the populace but princes, doctors, statesmen, ecclesiastics, cherished this delusion.

I have already had occasion in narrating the trials of the Knights Templars to say something of the history of witchcraft, and I would endeavour to elucidate a point which I then left obscure. At first witchcraft was mixed up with poisoning, not merely in the popular mind, but also in legal enactments directed against such offences. It was confounded too with practices not deemed harmful, the cure of the sick by people who had not studied medicine; the quack of the fifteenth century was a sorcerer. In course of time came a great change. The so-called

[1] S. Riezler, *Geschichte der Hexenprozesse in Bayern*, p. 48.

[2] Ibid.

[3] Ibid., p. 137.

white magic dies out. The black magic becomes more and more prominent.[1] Witchcraft becomes separated too in the popular mind from magic as practised in all primitive communities. It had been the art of exercising power by means of the occult powers of Nature. It had been associated with the pagan popular beliefs. More and more do the mythological elements disappear. More and more does witchcraft, as it appears in court, become an affair of complicity with the Devil. Witches are his servants. Their evil deeds are inspired by him. They owe their powers to him. They do his work, and are guilty because they do so. More and more is this belief in the complicity of witches with the evil one strengthened as time goes on. As Michelet[2] remarks, it may be said that :

'le *Malleus*, comme tous les livres de ce genre, contient un singulier aveu, c'est que le Diable gagne du terrain, c'est-à-dire que Dieu en perd ; que le genre humain, sauvé par Jésus, devient la conquête du Diable. Celui-ci, trop visiblement, avance de légende en légende.' . . . 'Le Diable est maintenant populaire et présent partout. Il semble avoir vaincu.'[3]

I am not sufficiently acquainted with the literature of the subject to speak with confidence of all the causes of this change. But one of them was the spread of a theology which, destroying the old popular mythology, replaced it by a concentration of the malign powers of Nature in the personification of Evil. Riezler, speaking of the literature as to the Devil which prevailed, says :

'Apart from the writings on the casting-out of devils, the whole of the literature on the Devil, which springs up with such dismal luxuriance from the middle of the sixteenth century, is a product of the theological ardour of the Protestant party.'[4]

[1] This is shown in Faust's career. Riezler, p. 161.

[2] J. Michelet, *La Sorcière* (2ème ed.) 1863 ; pp. 190, 193.

[3] Ibid., p. 203.

[4] Riezler, p. 160.

If asked to explain what crime they intended to put down by their cruel laws, the legislators and judges of the sixteenth century would have said 'the crime of entering into unholy compacts with the evil one'. And what a vulgar Satan these trials reveal! He is a malignant clown; sly, an ill-conditioned boor who turns milk sour, makes the calves and cows to die, and shoots ague-twinges into the bodies of his enemies. The old lubber fiend of Milton, 'le petit démon du foyer',[1] who pinched the maids and played boorish tricks, but still did kindly deeds, is changed into the malignant dark devil, full of lust and hatred, ever on the outlook to make human beings his slaves and tools, but working by low and vulgar tricks. And to think that this conception was common much about the time when Milton was creating his Satan, a Prince of Intellect, the incarnation of Pride, worthy product of the Renaissance! What a descent from this ennoblement of evil to the rustic lout, whose tastes were plebeian, who kept low company, who had midnight dances with abandoned old women, and who did his worst when he sent a hail-storm to destroy your crops or raised a gale of wind which kept the fishing-boats from going out, or drowned a few harmless mariners. For the prevalence of this belief very many persons were responsible; many things conduced thereto; notably the set of the theology of the time, the attention given to the Old Testament with its denunciation of witches, and the penalties prescribed for them, the prominence everywhere given to a personal devil. There can be little doubt that the epidemic caught on more readily in Protestant countries. There can too be little doubt—though the fact has been questioned by biographers—that Luther

[1] Michelet, pp. 48 ff.

gave an impulse to the popular creed. That he believed in witchcraft is clear. That he thought women were particularly its agents is clear also.[1] He was all for severity. He jeered at the *iuristae* who wanted too much evidence *contemnentes illa manifesta*.[2] As he grew older he was more and more hardened in this belief. Nor is it a complete defence of him to say with his apologists that in this he did but continue medieval beliefs. As to so many things he had cast off its yoke. 'Why did he leave just the witch-mania untouched?'[3] In these trials it comes out that each country has its own type of witch-craft; and to deal fully with the subject it would be necessary to examine many trials.

Unfortunately this difficult task has not been attempted. These trials have never been examined by writers conversant with the facts in several countries. I am unable to supply what is wanted. All that I can do at present is to take some illustrative examples from two countries, from Scotland and Germany. We shall find that the old mythologies have not entirely died out. In Germany there is much about the Devil, who appears in all sorts of disguises and generally as a sort of rustic Mephistopheles. In the Scotch trials Elfinland is much heard of. The Queen of that country figures in the indictments and evidence. Not a few of the men and women who are put on their trial have been lured away by her and have for years lived in her Court. There and from her they have learned some part of their magical powers. In a remarkable fashion the Scotch trials show the confluence and confusion of popular mythology and of the theology of the time by the mixture of things incongruous, secular and profane, Christian and pagan,

[1] Paulus, p. 28. [2] Ibid., p. 38. [3] Ibid., p. 45.

in uneducated minds. I have had great difficulty in making a selection—so vast are the materials. But I take first as a fairly typical example the case of Elizabeth or Bessie Dunlop, tried in 1576 in Edinburgh,[1] one of the earliest and strangest cases recorded. The dittay or indictment gives, what is rare, a minute account of the devices of this witch: the 'Invocatioun of spretis of the devill; continewand in familiartie with thame, at all sic tymes as sche thocht expedient; deling with charmes, and abusing the peple with devillisch craft of sorcerie.' The dittay or indictment, no doubt based, as Pitcairn remarks, on declarations or confessions elicited by means of exquisite tortures—was for:

'the using of sorcerie, witchcraft and incantatioune . . . be the meanis eftir specefeit. IN the first, That fforsamekle as the said Elizabeth being demandit, be quhat art and knaulege sche culd tell diverse persounes of thingis thai tynt, or wer stollin away, or help seik persounes? Ansuerit and declarit, that sche hirself had na kynd of art nor science swa to do; bot diverse tymes, quhen onye sic persounes come ather to hir, sche wald inquire at ane Thome Reid, quha deit at Pinkye, as himselff affirmit; wha wald tell hir, quhen euir sche askit.

(2) ITEM, Sche being inquirit, quhat kynd of man this Thom Reid was? Declarit, he was ane honest wele elderlie man, gray bairdit, and had ane gray coitt with Lumbart slevis of the auld fassoun; ane pair of gray brekis, and quhyte schankis, gartanit abone the kne; ane blak bonet on his heid, cloise behind and plane befoir, with silkin laissis drawin throw the lippis thairof; and ane quhyte wand in his hand.

(3) ITEM, being interrogat, how and in quhat maner of place the said Thome Reid come to hir? Ansuerit, as sche was gangand betuix hir awin hous and the yard of Monkcastell, dryvand hir ky to the pasture, and makand hevye sair dule with hir self, gretand

[1] R. Pitcairn, *Criminal Trials in Scotland, 1488–1624*, i, Part 2, p. 49 (1576).

verrie fast for hir kow that was deid, hir husband and chyld, that wer lyand seik in the land ill, and sche new rissine out of gissane.

The foirsaid Thom mett hir be the way, healsit hir, and said, " Gude day, Bessie " ; and sche said, " God speid yow, gudeman." " *Sancta Marie,*" said he, " Bessie, quhy makis thow sa grit dule and sair greting for ony wardlie thing? " Sche answuerit, " Allace! haif I nocht grit caus to mak grit dule? ffor our geir is trakit ; and my husband is on the point of deid, and ane babie of my awin will nocht leve ; and myself at ane waik point ; haif I nocht gude caus thane to haif ane sair hart? " Bot Tom said, " Bessie, thow hes crabit God, and askit sum thing you suld nocht haif done ; and, thairfoir, I counsell thee to mend to him : for I tell thee thy barne sall die, and the seik kow, or yow cum hame ; thy twa scheip sall de to : bot thy husband sall mend, and be als haill and feir as euir he was." And than was I sumthing blyther, fra he tould me that my gudeman wold mend.'

Then proceeds the narrative:

'Thome Reid went away fra me, in throw the yard of Monkcastell ; and I thocht he gait in at ane naroware hoill of the dyke nor ony erlie man culd haif gone throw ; and swa I was sumthing fleit.'

So far a homely devil, on the whole kindly and respectable, with a command of pious phrases and disposed to give good advice. At the third meeting (details of the second are not given), which was at a place between her own house and the Thorntree of Damwstarnok, Thom promised her 'bayth geir, horsis, and ky, and vthir graith, gif scho wald denye hir Christindome, and the faith sche tuke at the funt-stane.' The fourth time when she met him there were with him eight women and four men. She asked who the women were and she was told:

'Thai war the gude wychtis that wynnit in the Court of Elfame ; quha come thair to desyre hir to go with thame : And forder, Thom desyrit hir to do the sam ; quha ansuerit, " Sche saw na proffeit to gang thai kynd of gaittis, vnles sche kend

quhairfor!" Thom said, "Seis thow nocht me, baith meit-worth, claith-worth and gude aneuch lyke in persoun; and (he) suld make hir far better nor euer sche was?" Sche ansuerit, "That sche duelt with hir awin husband and bairnis, and culd nocht leif thame." And swa Thom began to be verrie crabit with hir, and said, "Gif swa sche thocht, sche wald get lyttil gude of him."'

So far the dittay or counts in the indictment. She was interrogated, probably under torture, and the facts, if we may so call them, elicited, were these: that she had got from Tom a herb, that he

'gaif hir, out of his awin hand, anething lyke the rute of ane beit, and baid hir owthir feith, and mak ane saw (salve) of it, or ellis dry it, and mak pulder of it, and gif it to seik persounes, and thai suld mend'; that she could tell nothing of the future except so far as Tom told her; that she had told who had stolen certain articles of clothes and the coulters of ploughs.

Such was a fairly common accusation with its mixture of triviality and superstition. Of the trial nothing is known except that it had the usual ending; the accused was found guilty; she was probably sentenced to be carried to the Castle Hill to be there 'wirreit at ane staik', i. e. strangled and her body burnt to ashes.

The accusations against witches were not always practices so harmless as this which I have just described. I take as example of another kind of charge, the case of Margaret Wallace,[1] charged, 20th May 1622, with witchcraft, sorcery, charming, incantation, soothsaying, abusing the people, before the Court of Justiciary composed of Colvile of Blair, Justiciary, Lord Walter Stewart of Mynto, bailiff of the Regality of Glasgow; assessors the Archbishop of Glasgow, Lord Innerteil, John Wemyss of Craigtoun.

[1] R. Pitcairn, *Criminal Trials in Scotland, 1488–1624*, iii. 508.

The major premiss of the dittay was based on the prohibition against witchcraft contained in the 20th chapter of Leviticus and the 18th chapter of Deuteronomy. The acts laid to the charge of the accused were :

(1) That she having conceived deadly hatred of one Cuthbert Greg, in concert with another witch by

'devillische Inchantment practizet be hir vpone him, he was visseit and grevouslie trubilit with ane strange vnnaturall and vnknawin disseis, maist crewallie and lamentabillie tormentit with continuall sueiting, be the space of fyftene dayis togidder, and thairby wes brocht to sic infirmitie and waiknes, nane expecting his lyfe, that he was nocht hable to steir or move himself.'

(2) That being 'suspectit as the onlayer and causer of the grevous and heavie disseis', she was sent for and came and took him by the 'shackle-bane', i. e. the wrist, by one hand, laying the other upon his breast. When he was unable to lift his legs without help she urged him to rise and by her sorcery practised upon him he was able to walk without help.

(3) That she being grievously sick sent to a witch (Cristiane Grahame), who was burnt for her devilleries, and was cured by her.

(4) That she laid a cruel sickness upon a young infant; that she offered to cure the child; that the mother refused, saying that she could commit her bairn to God 'and nocht mell with the Devill or ony of his instrumentis', and that thereupon Margaret Wallace most blasphemously and devilishly answered that Cristiane Grahame could as much in that errand in curing of the disease as if God himself would come out of Heaven to cure her, and albeit the death-stroke was laid on, she could take it off again.

(5) Further that a Kristy Grahame had confessed that

Margaret Wallace was art and part with her in her wicked deeds, and received from her some coloured silk and worset, for practising of witchcraft against persons to whom Margaret bore envy.

(6) That one Margaret Mure being heavily diseased with a strange and uncouth sickness, she between 11 and 12 hours under silence and cloud of night went with Christy Graham to the yard of James Fynlay and there practised for the space of an hour sorcery and witchcraft for the curing of the child and taking off sickness, and that same night the sickness was taken off the child.

(7) That having a grudge against one Alexander Boig she laid a cruel and fearful sickness upon a child of four years of age so that the child died in two days.

So much for the Scotch cases, of which I believe these cases are fair examples.

Summing up their characteristics I may say that they show a strange mixture of superstitions, a confusion of Christian and pagan beliefs; that they show the witches to have been often unlicensed practitioners of the healing art; that the offences laid to their charge included not only the casting of evil spells upon their victims, but the effecting of cures by unlawful means, and in all of them the Devil is the principal figure.

The next case which I select as illustrative of the history of procedure is of a very different kind from any of these, though it is almost contemporaneous. It is that of the trial of the mother of the great Kepler; a trial which took place early in the seventeenth century (1615–21) at Leonberg in Wurtemberg. The documents have been preserved and were published for the first time, I believe, by Dr. Frisch in his *Opera Omnia* of Kepler.[1]

[1] J. Keppler, *Opera Omnia* (ed. C. Frisch), viii. 361.

The trial, apart altogether from the interest which it has in connexion with Kepler, had great effects.

The 'Keplerin', as she was called, had not been fortunate in life; her husband, restless and thriftless, had left his home to go to the wars, and she followed him; they returned to their home, but he again left her and was not heard of, leaving her with four children, the eldest becoming the famous astronomer, Johannes Kepler. She had always been ill-tempered; soured and embittered by misfortunes, two of her children anything but a comfort to her, she became quarrelsome and was disliked by her neighbours. Her son the astronomer, who stood valiantly by her in the hour of need, was under no delusion as to her temper. He describes her as 'parva, macra, fusca, dicax, contentiosa, mali animi',[1] a disturber of the whole community and 'delira et garrula femina'.[2] Her eldest son had gone to the Austrian Court. Her daughter had married and was no longer with her, and in her solitude she became morose and eccentric. Hearing in a sermon that it was the habit of various nations to drink from skulls to remind men of their mortality, she wanted to dig up the skeleton of her father, to take the skull, mount it in silver and send it as a present to her son, the astronomer. Her mother had dabbled in medicine. She did the same, accompanying her remedies with strange ceremonies. If she effected cures they were forgotten, her failures only were remembered. She used charms which did not cure and compounded strange potions which made people ill. The neighbours conceived a bitter hatred against Frau Kepler.

'Fama malum', says Kepler,[3] 'quo non aliud velocius; statim

[1] J. Keppler, *Opera Omnia* (ed. C. Frisch), viii. 361.

[2] Ibid., p. 380.

[3] Ibid., p. 377.

enim in gente superstitiosissima serpsit haec suspicio, cum argumentum ab aetate matris meae septuaginaria necterent, aque vitiis nonnullis, quibus laborat mater mea, ut sunt nugacitas, curiositas, ira vehemens, imprecationes, pertinacia in expostulationibus, quae vitia in hac aetate sunt eo loci vulgatissima. . . . Mater irarum et furoris plena quo magis expostulavit cum faece populi, hoc magis famam et suspiciones auxit.' [1]

He endeavoured to prevent her being put in prison, but failed.

One of her sons circulated evil stories about his mother. A neighbour set abroad the story that Frau Kepler had administered to her a *zaubertrank* (a magic potion). In the town was one of those horrible creations of the time, a *hexenspürer* (a witch hunter), Lutherus Einhorn, a fanatical pursuer of witches whose motto was 'To the stake with all old women.' By torture he sought to extract from another witch admissions against Frau Kepler. He collected and magnified all the gossip against her. A formal complaint in forty-nine articles was lodged against her; the chief charges being that she had administered potions to various persons, that her son said she had killed a neighbour's calf, that she had said there was neither heaven nor hell. For years the case dragged itself indecisively along. Started in 1615 it was not really brought before the courts until 1619, when Frau Kepler was 73 years of age. To prove the charges against her some dozen witnesses were called. After the opening of the sitting her son, Johann Kepler, submitted a series of searching interrogatories, 122 in number, for the examination of the witnesses. He also prepared a masterly defence (*Exzeptions und Defensionsschrift*), in which he showed that the sickness and disease which his mother was

[1] Ibid., p. 378.

supposed to have caused were natural maladies, at all events, not attributable to his mother's powers. He does not attempt to deny the existence of witchcraft, and whatever may have been his own beliefs, no doubt he acted wisely. For Kepler himself was not a *persona grata* to the theologians of the time or unsuspected of heresy. His science, astronomy, was to the seventeenth century what geology was to the nineteenth, the battle-ground of the old and new faiths. Strange coincidence, about the time Galileo was in trouble with the Roman Inquisition Kepler was in trouble with the Tübingen theologians. He was not at one with the Lutherans as to several points, particularly as to the Lord's Supper, and he had been excommunicated by the Stuttgart Consistorium.

Kepler confined himself to a close critical examination of the existence and the origin of the charges, a masterly dissection of the evidence. He tried, but tried in vain, to prevent his mother being imprisoned. He protested against torture being applied to a woman of 74. The Court decided (10 September 1621) to take what seems to us a strange course ; they were not to inflict upon her actual torture ; but they were to make believe of doing so. Guarded by halberdiers she was to be brought into the torture chamber ; the torturer was to be present ready to do his work ; the instruments were to be shown to her ; and she was to be questioned. So on the 28th of September the terrible comedy was gone through. I describe in a few words the scene which has not so far as I know been portrayed by dramatist or artist.[1]

Totally unconscious of the cruel trick played upon her and called upon by the judges to speak the truth, she

[1] J. Keppler, *Opera Omnia* (ed. C. Frisch), viii, 549 ; the scene is much amplified by L. Günther, in his work *Ein Hexenprozess*, pp. 73–8.

answered with a clear voice, 'I have nothing to confess. I know nothing of witchcraft and sorcery although I did spend my childhood in the house of some evil and criminal vagabond.' She hoped, she said, her son would save her from the flames. Whereupon the judge burst out in furious tones against Kepler who had himself wronged Holy Church and published unchristian books and predictions. Her answer was 'My son's knowledge and good understanding are gifts of God, and I rest upon Him; this will be my last word, even if I must give up my soul to God under the sufferings of torture.' Then the judge shouted out, 'Away with the witch to the torture chamber': whereupon she was roughly hurried to an underground vaulted chamber. There were the judges, the physician that attended on such occasions, the executioners and all their hideous instruments. They showed her one by one these instruments, and told her they would be used. 'Answer now, accursed witch, and save thyself from torture and thy soul from lies.' 'Do with me as you will, and, even if you take from me every drop of blood, I know of nothing to confess; rather will I die.' She denied having done any one harm. 'Which of you who are here to do an evil deed would counsel me to lie or compel me to tell an untruth? . . . I am certain of this, God will punish the witnesses who have brought me to this state of misery.' Whereupon she fell on her knees to pray, asking God to make a sign that she had practised no sorcery, and then fainted away. The hideous comedy was at an end; she had stood the terrible ordeal. On the 3rd of October the court ordered her release, much to the disgust of the fanatical prosecutors who for six years had pursued her. On the 4th of November 1621 she was set at liberty. She, then 74 years of age, did not live long,

probably not long enough to know that her trial had no small effect in opening men's eyes to the iniquities practised under cover of religion.

It is an ugly and repulsive story, some of the worst details of which I have passed over.

My belief is that neither in Scotland nor in England would she have escaped. The long-winded procedure, almost entirely in writing, the adjournments, the elaborate pleadings, the examination in writing of the witnesses were a bar to popular excitement.

To the jurist these cases have many points of interest, particularly as to procedure; and among such points are these:

(1) That the cases of prosecutions for witchcraft enormously increased when they became the subject of proceedings in secular courts. That took place all over Europe, with the result that everywhere in all local courts many such prosecutions were instituted, and that their number was larger, particularly in remote parts where superstitions were most prevalent. We know that the ecclesiastical judges in some instances did their best to discourage such prosecutions. They had little control over the local courts, in which such proceedings became the easiest and most convenient mode of gratifying personal spite. It was the sixteenth-century form of boycotting.

(2) A second fact to be noted is that some of the ordinary tests of truth furnished no security against deception of judges and juries. Almost always the prosecutors tried to elicit, and to proceed upon, admissions or confessions. No doubt these were often obtained by cruel torture; torture particularly terrible in the case of witches in Scotland by preventing them day and night

from sleeping, a method which was found more effectual than any other in breaking down obstinacy. Torture in some form was in fact inseparable from these prosecutions.[1]

(3) Even if the prosecutors did not succeed in extracting admissions fatal to the accused they generally managed to wring from them by torture some statement which revealed the existence of accomplices; it is a characteristic of such trials that it was always assumed that there were accomplices; witchcraft was not a solitary but a gregarious crime.[2]

Upon this Riezler has some remarks of value.

'If we ask "why this continual extension of prosecutions against a multiplicity of accused?" the answer is to be found in the application, which became more and more universal, of the principle that the accused must also be questioned about accomplices and companions and tortured until they name them. Among the various aspects of the witch-mania, the appearance in the trials of a belief in the excursions and assemblies of witches is peculiarly ominous. From all other charges—covenants or intercourse with the Devil, or injuries to men and cattle—from all these nothing could be got to implicate any one but the accused herself. On the other hand, the delusion of witch-rides and witch-meetings gave the judges a regular opportunity of asking questions about companions and confederates. It is repeatedly remarked in the minutes that it is improbable or impossible that a witch should not have become acquainted with other witches on these occasions.'[3]

(4) It would, however, be quite wrong to assume that

[1] Riezler, p. 150; P. Laymannus, *Processus iuridicus contra Sagas et Veneficos* (Cologne, 1629), pp. 15–16: Tit. II: 'On what evidence the Judge may lawfully torture prisoners.' Tit. III discusses the question whether the judge can proceed to greater extremities in sorcery than in other cases, and the answer is, Yes, he may. 'For this offence of sorcery is so great and comprehensive that it includes in itself almost every other crime.' [2] Ibid. [3] Riezler, p. 151.

these admissions were always the result of the application of torture; the strange fact is that they were often made voluntarily and freely. That was the experience of every country. I take again as an example the minute circumstantial confessions made by some of those accused of witchcraft in the north of Scotland in 1662.[1] One Isobell Gowdie gives, as she says, without any compulsion, a detailed account of her meetings with the Devil and her entering into a compact with him, of her flying through the air, of her meeting the King and Queen of Fairies, of her going to midnight meetings in the form of a jackdaw, while others assumed the form of a hare or of a cat. She described and recited the rhymed charms, a mixture of pious phrases and unmeaning words, used by them to raise storms or to turn themselves into a cat, a hare or a crow. She told how she shot elf arrow-heads shapen by the Devil with his own hands:

'That quhich troubles my conscience most, is the killing of severall persones, with the arrowes quhich I gott from the Divell. The first woman that I killed wes at the Plewgh-landis . . .; also I killed an in the East of Murrey, at Candlmas last. At that tyme Bessie Wilson, in Aelderne, killed on thair; and Margaret Wilson, ther, killed an vther; I killed also James Dick in Canniecavill. Bot the death that I am most of all sorrie for, is the killing of William Bower, in the Miltowne of Moynes; Margaret Brodie killed an voman, washing, at the Burne of Tarres; Bessie Wilsone killed an man at the Bushe of Strutheris; Bessie Hay in Aulderne killed an prettie mon called Dunbar, at the Eist end of the Towne of Forres, as he wes coming owt at an gaitt; Margaret Brodie in Aulderne killed on David Blak in Darnvay,'

and so on, in a string of homicides.

'The Divell gaw Margaret Brodie an arrow to shoot at him (the Minister of Aulderne) quhilk she did; bot it cam short; and

[1] Pitcairn, iii. 602.

the Divell cawsed tak it wp again. We desiret to shoot again, bot the Divell said, "No; we wold not gett his lyff at that tyme!" The Divell cawsed me to shoot at the Laird of Park, as he was croceing the Burne of the Boath; bot I missed him.'

Strangest fact of all, the accused were found to corroborate each other. Some of the accused had not the consolation of the martyr, the consciousness of innocence.[1] There is good reason to think that these victims of obsession did mentally enter into compacts; did have midnight meetings; did harbour evil designs; did seek in occult arts the gratification of malignant passions.[2] There was a basis of facts in these wild delusions, but judges, juries, and the victims themselves drew the wrong inferences from them. In view of these facts the late Sir James Stephen justified the action of the juries who found these wretched creatures guilty of foul crimes: 'It is clear', he says, 'that they could not have acted otherwise than they did, and that it would have been an unreasonable proceeding on their parts to enter upon what was then regarded as the fanciful speculation which denied that witchcraft ever took place.'[3]

If my reading of these stories is true, that is not the whole explanation of these judicial errors. All the neurotic, many of the insane or feeble-minded or hysterical or epileptic, found in the prevalent beliefs as to witchcraft ready-made forms or moulds for their delusions. It was as natural for them to think of themselves as witches as it is now for one who is at once vain and insane to think that he is a monarch or a millionaire.

[1] Riezler, p. 153. [2] Ibid., p. 157.

[3] Sir J. F. Stephen, *A General View of the Criminal Law of England*, pp. 209–10, quoted in *Psychology applied to Legal Evidence*, G. F. Arnold, 1906, p. 248.

Indeed, more so; for then there were no competing superstitions. For them the delusion was, to quote a writer in the *Revue Philosophique*,[1] 'un rêve commandé et vécu'. But that was not the entire explanation. Judges and juries and accusers were often influenced and blinded by fear, that greatest impediment to justice, a vague fear of the unknown; fear too great to permit of leniency or mercy. Then, too, judges, juries, and prosecutors and the whole population stimulated and suggested these delusions. As Bernheim says of modern phenomena not unlike those of the sixteenth and seventeenth centuries:

'Les avocats, les prédicateurs, les professeurs, les orateurs, les négociants, les charlatans, les séducteurs, les hommes d'état . . . sont des suggestionneurs. Le fanatisme politique et religieux, le nihilisme, l'anarchisme, le boulangisme, se recrutent par voie de suggestion auditive.'[2]

All concerned in these proceedings suggested to the accused what was vividly present to themselves. Many of them used these proceedings for their own private purposes. And in the reports there is a curious absence of all attempts to cross-examine the witnesses, to sift the truth in rumours, to discriminate between the confessions of the sane and the wild imaginations of those possessed with some delusion.

I have described several trials which show how courts of justice may be made by the State instruments of oppression. For all time the trials as to witchcraft are a warning that courts may fail to elicit truth and may do evil deeds if they seek to give effect to popular beliefs. The man in the street may be as wrong-headed and as cruel as the tyrant on the throne.

[1] *Revue Philosophique*, 1911, p. 229. [2] Ibid., p. 235.

XI. LES GRANDS JOURS D'AUVERGNE

I INVITE you to turn to a very different scene from that of the other trials which I have described. I ask you to consider not one trial only but a group of trials, not the proceedings of a stationary court, but of one sent out to administer justice in exceptional circumstances; a court formed to meet a particular emergency; a sort of punitive expedition of justice. I might describe these trials as efforts made to extend or maintain the King's peace, if that phrase had not a special connotation applicable only to England.

For centuries our circuit system has been in existence, and we have come to take it for granted that there must always be something of the kind in every complete judicial system; judges travelling from place to place or sent down to effect a jail delivery; that there must be close and regular communication between the outlying parts of the machinery of justice and the centre; that otherwise there can be no uniformity in the administration of justice, and abuses would be certain to spring up. Now that assumption is by no means universally verified. I may indeed say that it is quite exceptional. It is not the state of things, the judicial organization, which you would have found in most countries in Europe in the sixteenth or seventeenth century. You would have found in all of them a multitude of local courts with varying ill-defined jurisdiction. Each prince, each noble, each landowner had his court or courts. Justice ran with the land. Such was the feudal notion. He who was the feudal head had necessarily the right of holding courts.

'Il y avait dans la société féodale deux sortes de justice, la *féodale* et la *seigneuriale*. La première, tout seigneur de fief l'avait sur ses vassaux et sur ses tenanciers, lorsqu'il s'agissait des litiges relatifs à la tenure; elle dérivait, à l'origine, d'une convention. La seconde était un démembrement de la puissance publique, devenue, comme fief, la propriété de certaines personnes; elle n'appartenait qu'au seigneur justicier sur les habitants de son territoire.' [1]

That is an observation generally true.

To take first the state of things in England. We find local courts set up in virtue of special charters or as appendant to land; courts, in which the lord was often judge and party. According to Professor Maitland's classification there were communal, municipal, and seignorial courts; there were courts possessing franchises and regalities, existing, it was assumed, in virtue of some grant from the Crown. There were also courts existing by reason of the possession of a manor or of there being tenants of a lord.[2] There were Courts Leet, Courts Baron, Hundred Courts, Customary Courts. There were the Manor Courts.[3]

'If a lord says he has *liberam curiam*, he also says that he has *liberas furcas*, which does not mean a gallows for freeholders but merely signifies that the gallows is all his own, and that no one else must interfere with his thieves.' [4]

It was not a question of maintaining the King's peace; each seigneur had his own peace to preserve. The indictment in the Courts Baron complain of acts done 'contrary to the peace of God and the peace of the lord of the manor'.

[1] A. Esmein, *Cours élémentaire d'histoire du Droit français*, p. 423.

[2] F. W. Maitland, *Select Pleas in Manorial and other Seignorial Courts*, Introduction, p. xvii.

[3] A. T. Carter, *A History of English Legal Institutions*, p. 23.

[4] Maitland, p. xix.

Nor do these details give any adequate notion of the variety of local courts. All boroughs had their own court, a few of which still survive. Some of them were originally the domestic courts of merchant guilds, which gradually developed into the governing bodies of the communities. There was a similar variety of local courts in France. There were many local royal courts, the lowest in jurisdiction being presided over by *prévôts* or *châtelains*. Their business was to decide disputes between *roturiers*. Above them were baillis and sénéschaux who, at first royal inspectors, had become stationary judges to whom lay an appeal from the sentences of the inferior judges and to whom suits begun before the *prévôts* or *châtelains* might be withdrawn. The sénéschaux and baillis had unrestricted jurisdiction over all matters and all persons. Then too there was great variety of seignorial courts in which the feudal lord once sat.[1] In the fourteenth and fifteenth centuries this practice had disappeared; they were represented by their baillis or prévôts. Whether there was the same variety as in England I cannot say. The maxim 'Fief et justice n'ont rien de commun'[2] seems to have been applied more in France than in England. But there were *les basses justices* arising from the relations of Lords and Vassals or tenants; *les moyennes justices*, similar jurisdiction but of greater extent; and *les hautes justices*.[3]

There was at least equal diversity in Germany.[4]

[1] Esmein, p. 425.

[2] J. E. Guétat, *Histoire élémentaire du Droit français*, p. 559.

[3] The system is described in C. Loyseau's *Traité des Seigneuries*, 3rd ed., 1610. Loyseau gives an elaborate description of the Haute, Moyenne et Basse Justice, which once corresponded to different seigneuries (*grandes, médiocres et petites seigneuries*).

[4] R. Schröder, *Lehrbuch der Deutschen Rechtsgeschichte* (1889),

I need scarcely say that the same account might be given of Scotland. There existed many local courts in which feudal lords were judges. In fact not until 20 Geo. II, c. 43, was heritable jurisdiction in Scotland abolished.

It matters not whether we have in view England, France, Germany, or Scotland; there was this surprising multiplicity of local jurisdictions. Such courts were often corrupt and tyrannical. They were often art and part in wrong doing; they were often wanton usurpers of power. Probably they did their duty in simple cases in which no powerful local interests were concerned. To take for example the Courts Baron; no doubt in cases of battery, or trespass, or in the case of uttering 'villainous words', suing for small debts, they generally acted fairly. But when it came to be a question of bringing to justice a powerful lord or of punishing his retainers, or inquiring into charges of chasing or taking deer in the lord's park, or carrying stubble from the lord's meadows or of cutting wood in the lord's woods, justice was out of the question.

'La justice étant pour le seigneur une propriété, le juge était obligé de la rendre le plus lucrative possible, c'est-à-dire d'appliquer des amendes nombreuses et fortes, s'il voulait éviter de recevoir " une prébende de va-t'en ".'[1]

In Scotland the cases of oppression under cover of judicial power were many, gross, and flagrant. To take one of many available examples the editor of Pitcairn's

pp. 528–73: Reichshofgericht, Landesfriedensgericht (p. 536); 'Every county had its own tribunal.' 'An intermediate position was occupied by the feudal court, which could be held by every lord who had more than one vassal' (p. 568). 'It was the duty of the lord to do feudal justice for his men' (p. 569).

[1] Guétat, p. 568, quoting Loiseau, *Offices*, ch. iv, no. 36.

Trials, referring to the conduct of the Sheriff of Wigton,[1] says:

'The hereditary Judge, and highest legal functionary in the district, appears to have vied with the most desperate of the Border thieves in the commission of all sorts of crimes; expecting, doubtless, that his high office and influence would sufficiently protect him from merited punishment for his odious oppressions'.

What Patrick Agnew did others also no doubt freely did. Even if the courts were to be trusted, they were often overawed and defied by powerful nobles and chiefs. What did the Armstrongs or the Scotts, or 'Hob the King' or Kinmont Willie care for the local courts? The courts were their own or their neighbours'.

In the trial of Patrick, second Earl of Orkney, for high treason and tyrannical oppression of the inhabitants of Orkney and Shetland,[2] we get an insight into the state of things which might exist with such local tyranny. The Earl appointed his own judges, compelled the people to labour as serfs, imposed his own taxes, put offenders in prison, and compelled many persons to enter into a bond or league of mutual protection and defence and promises never to seek aid from King, Council, or Session. And so in every country we come to a time not far off when the reign of law is only partial; when whole classes and districts lie outside it; when there are so many Alsatias, the outlaws' home; whole regions in which the King's writ does not run; districts wholly outside the pale of law and order.

In this state of lawlessness and absence of all effective check upon oppression we see the origin of certain great

[1] R. Pitcairn, *Criminal Trials in Scotland, 1488–1624*, i. 92.

[2] 1610, Pitcairn, iii. 81.

popular outbreaks such as the peasants' wars. And if I am not much mistaken, we may detect in the details of the trials which I am about to describe the premonitions of the French Revolution.

When the cries of the oppressed became too loud to be ignored, what was to be done? Three courses were open to the central power. To some powerful noble a commission might be given to pursue with fire and sword the oppressors or wrongdoers, a course sometimes taken in Scotland. In that country, where the central power was weak, such commissions were common. For example, we find instances of commissions granted by the King to the Provost and Bailies of burghs and the Sheriff for the purpose of 'haulding Justice Courtis on Witches and Sorceraris'.[1]

A second course was to establish a regular circuit system, judges being sent from London or other centres to do justice throughout the country. In England there was at an early date such a system; along with the judges sitting where the King was, or in London, were perambulating or visitatorial courts,[2] *justiciarii errantes*. As far back as the time of Henry II (1176) there were itinerant judges, 'viros sapientes ad faciendam justitiam;'[3] not always lawyers, but abbots, chaplains, or members of the King's household. The Charter of 1215 ordered the assizes to be held four times a year in every county.[4] This course was also established at an early date in Scotland; justices in Eyre are known as early as 1290.

The third course was the easiest, to send out a special commission, in other words, to dispatch a punitive expe-

[1] *Miscellany of the Spalding Club*, i, Pref., p. 49.

[2] F. W. Maitland, *Select Pleas of the Crown*, Introduction, pp. ix–xx.

[3] Carter, p. 65.

[4] Maitland, p. xxi.

dition for the punishment of wrong-doers.[1] This was done from time to time in many countries. It was done repeatedly in France, where nothing corresponding to the circuit system existed. At the time of which I speak, the middle of the seventeenth century, France was in a parlous state. 'Le royaume de France était rempli de survivances féodales.'[2] In some parts of it there was anarchy; the law was powerless against the feudal lords. The state of things in Auvergne was particularly bad.

'Il est vrai, me dit-il, et vous le savez aussi bien que moi, que L'Auvergne étoit une province bien déréglée, et que l'éloignement de la justice souveraine, la foiblesse des justices subalternes, la commodité de la retraite dans les montagnes, et peut-être l'exemple ou le mauvais naturel de quelques-uns, avoient donné courage à la plupart des gentilshommes de faire les tyrans et d'opprimer les peuples.'[3]

Totally independent of all control, the province produced monstrous specimens of egotism, whose passions were a law to themselves and who knew no other: energetic men whose activity, finding no natural outlet, spent itself in high-handed acts of violence. Some had served as soldiers, and, retiring to remote parts, made war at home: murdered, ravished, oppressed, without fear of being called to account. To conceive the state of the province, one must think of people wilder than the country; nobles who were veritable Bluebeards, little kings in their own domains, whom Richelieu's long arm had not reached; they levied taxes; with no religious

[1] Perhaps there was a fourth course, to establish or maintain a court specially designed, like the Star Chamber or Privy Council, to deal with bold offenders.

[2] E. Lavisse (ed.), *Histoire de France*, vii. 1, 50.

[3] V. E. Fléchier, *Mémoires de Fléchier sur les Grands-Jours tenus à Clermont en 1665, 1666* (ed. B. Gonod, 1844), p. 322.

scruples they appropriated the tithes; they debauched the daughters of their neighbours; they stole their wives and often murdered them. Huge overgrown products of unchecked vice, they sold justice and did not sell it clean. They levied taxes. They laughed at the representatives of the royal courts. The only restraint was that they quarrelled with each other and made war against each other. The family life of high and low was unedifying. A young noble shows his spirit by murdering a peasant or a curé. A young girl shows hers by running away from home to a husband and then running away from him or poisoning him. There were plenty of full-blooded crimes. 'Supermen' abounded. Perhaps in many other parts of Europe there was a similar condition of things; it happens that we have a vivid picture of the condition of things in Auvergne.

'Le peu d'égard qu'ils avoient pour la religion, la grande avidité d'avoir du bien, l'autorité qu'ils ont parmi ces habitans des montagnes, et l'éloignement de toute sorte de justice, leur fait prendre impunément toute sorte de libertés. Ils oppriment l'Eglise après avoir opprimé les pauvres, et n'étant pas encore contens des héritages de leurs voisins, qu'ils trouvent à leur bienséance, ils usurpent encore l'héritage de l'épouse de Jésus-Christ, et tyrannisent les prêtres après avoir tyrannisé les peuples.'[1]

It was resolved to put an end to this state of turbulence and anarchy—to do so by holding the Grands Jours in Clermont, the capital of Auvergne.

'Les Grands-Jours étaient des assises extraordinaires tenues par des juges choisis et députés par le roi. Ces juges, tirés du parlement, étaient envoyés, avec des pouvoirs très-étendus, dans les provinces éloignées, pour juger en dernier ressort toutes les affaires civiles et criminelles, sur appel des juges ordinaires des

[1] Fléchier, p. 308.

lieux, et principalement pour informer des crimes de ceux que l'éloignement rendait plus hardis et plus entreprenants. Ils avaient ainsi hérité de la mission de ces commissaires, appelés *missi dominici*, que nos rois de la première et de la seconde race envoyaient dans les provinces pour informer de la conduite des ducs et des comtes, et réformer les abus qui pouvaient s'introduire dans l'administration de la justice et des finances.' [1]

Their first business was to publish a *monitoire* [2] addressed to all persons who know those who have committed assassinations, thefts, abductions, arson, acts of violence, and the like crimes, jurisdiction over which belongs to the Grands Jours; who know to what places the criminals have fled or who are harbouring them; the contracts into which they have entered and under what names, in order to withdraw their property from seizure; those who are guilty of simony or have seized the tithes; those who force private persons to turn out with their teams and waggons to carry their goods; those who, being paid in corn-rents do not demand them in abundant years, but enforce their rights in times of scarcity. The whole document merits perusal. It is a striking catalogue of all acts of oppression then too commonly endured by the poor; a catalogue which goes far to explain the Jacquerie and the coming of the French Revolution. This was not the first time such assizes had been held in Auvergne. In fact they were held seven times either at Montferrand, Riom, or Clermont. The chief of these were the 'Grands Jours', 1665–6, which lasted from 26 September 1665 to 30 January 1666. We may judge of the character of the business from the fact that 'on y porta plus de douze mille plaintes'.[3] One cannot doubt that these Assizes had

[1] Ibid., Introduction, p. v.

[2] Ibid., pp. 333–8.

[3] Ibid., Introduction, p. vi.

great results. It is stated by the editor of M. Fléchier's narrative that the Grands Jours 'ont anéanti les derniers vestiges de la puissance féodale '.[1]

'Je remarquai par toute la campagne et dans Clermont, lorsque j'y fus arrivé, que la terreur étoit générale. Toute la noblesse étoit en fuite, et il ne restoit pas un gentilhomme qui ne se fût examiné, qui n'eût repassé tous les mauvais endroits de sa vie, et qui ne tâchât de réparer le tort qu'il pouvoit avoir fait à ses sujets, pour arrêter les plaintes qu'on pouvoit faire. Il se faisoit mille conversions, qui venoient moins de la grâce de Dieu que de la justice des hommes, et qui ne laissoient pas d'être avantageuses, pour être contraintes. Ceux qui avoient été les tyrans des pauvres devenoient leurs supplians, et il se faisoit plus de restitutions qu'il ne s'en fait au grand jubilé de l'année sainte.'[2]

It is worth noting that the coming and proceedings of the court had a great effect on the peasantry.

'On remarqua dans la poursuite de cette affaire que les paysans étoient fort hardis, et qu'ils déposoient volontiers contre les nobles, lorsqu'ils n'étoient point retenus par la crainte.'[3]

And this is not a passing mood.

'Si l'on ne leur parle avec honneur et si l'on manque à les saluer civilement, ils en appellent aux Grands-Jours, menacent de faire punir et protestent de violence.'[4]

The peasants believed that revolution had in fact come, that they need no longer work, that the King had no thoughts but for them.

'Ils étoient encore persuadés que le roi n'envoyoit cette compagnie que pour les faire rentrer dans leurs biens, de quelque manière qu'ils l'eussent vendu, et sur cela ils comptoient déjà pour

[1] Fléchier., Introduction, p. vii.
[2] Ibid., p. 55.
[3] Ibid., p. 177.
[4] Ibid.

leur héritage tout ce que leurs ancêtres avaient vendu, remontant jusqu'à la troisième génération.' [1]

It is worthy of note that Louis XIV was so impressed by the value of their work that he caused a medallion to be struck with the inscription 'Provinciae ab injuriis potentiorum vindicatae', and a medal with the inscription 'repressa potentiorum audacia'.[2] So far as I know there is no account of the proceedings written by a lawyer, at all events I have not found such. The only narrative to which I have had access is by one of the group of illustrious writers of the age of Louis XIV; one of those who wrote in the grand way which was the secret of that age. The historian of the Grands Jours was Fléchier, afterwards bishop of Lavaur, and at that time an abbé; an elegant and accomplished ecclesiastic; turning a couplet with ease; the arbiter of fashion; fond of innocent *galanterie* and with a taste for frivolity and, as it seems to us, surprisingly indifferent to the cruelties which he saw and described. In 1665 Fléchier, then 33 years of age, came to Clermont in the suite of M. de Caumartin, Conseiller du Roi, and as tutor of the son of M. de Caumartin; and he composed an account of what he saw, entitling it 'Les Grands Jours d'Auvergne'. It omits much which a lawyer would like to know. But it is probably unsurpassed as a picture of the sort of crimes prevalent in remote parts of Europe at a distance from the centre of power; a picture of the real obstacles to the establishment of the King's Peace in every country of Europe.

[1] Ibid. It is interesting to notice that the disturbance and unrest threw to the surface certain old rights, e.g. *le droit de retrait lignager*; Pollock and Maitland, *History of English Law* (1st ed.), i. 325, 632, 670; ii. 246, 328; *The Records of the Borough of Northampton*, i. 460.

[2] Fléchier, Introduction, p. viii.

I propose doing little more than selecting from Fléchier's account some typical examples of the criminals who were brought to justice, and I make this selection on three grounds:

(1) Because the Grands Jours are the most striking examples known to me of an attempt on a large scale to restore or introduce the King's Peace by legal methods;

(2) because the trials show medieval criminal justice at work; and,

(3) not least, because they illustrate an aspect of trials to which I have not yet adverted. Often they are the first certain premonitions of revolutions, the earliest clear signs of discontent rising to dangerous heights, though not yet breaking out into open revolt. Examine any modern revolution, whether here or elsewhere, and you will find that the first threatenings of the coming storm are heard in some legal proceedings. The hostile parties have not yet taken up arms. They seek to gain their ends through legal methods. Their passions are concentrated in some law court, where, with careful observance of the rules of the game and under cover of legal forms and with reference, it may be, to some technical point of criminal or civil law, the old and the new forces, irreconcilable tendencies, first come into collision. It is the path of revolution in a civilized country. I could mention half a dozen cases which have been the storm-bells or tocsins of revolution, and among them I would place the cases which I proceed to describe.

The first case is that of M. le Vicomte de la Mothe de Canillac, a member of a powerful family of Auvergne, which was among those most responsible for the prevalent turbulence and disorder. He had joined the party of the great Condé and received a commission to

raise a troop of cavalry. He had handed over to a gentilhomme named Orsonette 5,000 francs to raise troops. The latter neither raised troops nor returned the money. Hence a deadly quarrel, which was settled in the fashion of the province. They met with their retainers, and a fierce battle ensued. M. de la Mothe's party, consisting of 13 or 14 men, attacked Orsonette's, consisting only of 5, wounded Orsonette, killed his falconer, and put the party to flight. It was proved that he, the Vicomte, had threatened to attack his enemy and that he had marched with an armed party in front of his house. He was condemned to death. It was quick justice. He was tried and condemned on the 23rd October and executed four hours afterwards.[1] The historian remarks :

'Ce qui touchoit encore davantage, c'est qu'il étoit le plus innocent des Canillacs.'[2]

But of this innocent nobleman, it is added,

'Il avoit comme enlevé sa femme à M. Turcan, quoiqu'il eût gardé des formalités ; il avoit passé neuf ans sans aller à confesse, et s'étoit un peu mal servi de deux sacremens.'[3]

It is pointed out :

'Il se trouvoit dans ce procès une chose très-singulière, qu'on ne sauroit rencontrer que dans un pays aussi plein de crimes que celui-ci ; c'est que l'accusateur, celui qui avoit fait l'information, et les témoins, étoient plus criminels que l'accusé même. Le premier est accusé par son père même d'avoir tué son frère, d'avoir voulu être parricide, et de cent autres crimes ; le second a été reconnu faussaire, et condamné comme ayant violé la foi publique ; et les autres, pour plusieurs crimes, sont ou aux galères ou au bannissement perpétuel, et sont actuellement fugitifs.'[4]

I describe the outlines of another characteristic case

[1] Fléchier, p. 73.
[2] Ibid., p. 75.
[3] Ibid., p. 78.
[4] Ibid., p. 75.

tried in the Grands Jours of 1655.[1] M. du Palais had sought to enforce his seignorial rights in ways which brought him into conflict with a neighbour, M. de Magnieu. The latter took legal proceedings against M. du Palais, and five huissiers were sent to his castle to serve a summons. I give the account of what took place in M. Fléchier's own words.[2]

'Les huissiers ne manquèrent pas de venir exécuter leur commission dans toutes les formes, à la porte du château, et de témoigner à ces messieurs qu'ils étoient sujets aux lois et aux ordonnances des juges, comme les autres. Cette hardiesse ne leur plut pas ; ils délibérèrent s'ils devoient s'en venger sur-le-champ, ou s'il falloit différer quelque temps leur ressentiment pour l'assouvir avec plus de violence et avec plus de sûreté. Quelque chaleur qui les emportât, ils furent capables d'un peu de modération, et se contentèrent pour lors de leur donner la chasse et de les menacer. Il n'étoit pas malaisé d'épouvanter ces sortes de gens, qui se retirèrent au premier village pour y passer la nuit ; mais personne ne voulut les recevoir, parce qu'ils étoient ennemis de M. du Palais qu'ils aimoient ou qu'ils redoutoient. Ils ne furent pas mieux reçus dans les autres endroits pour les mêmes considérations, et quelque tard qu'il fût, ils furent obligés d'aller loger à six lieues de là, où, après s'être retirés, ils reposoient fort profondément, lorsque deux troupes de gens à cheval arrivèrent du Palais, entrèrent avec violence dans l'hôtellerie, passèrent dans une chambre où trois de ces huissiers étoient couchés, et tirant plus de vingt coups de pistolet en tuèrent deux, et cassèrent l'épaule au troisième qu'ils obligèrent de se traîner encore tout sanglant jusqu'à la chambre de ses compagnons, lesquels se voyant dans la dernière extrémité, se jetèrent à leurs pieds, implorèrent toute leur pitié, et n'attendoient plus que la mort. Quelques-uns, échauffés dans le premier meurtre, furent d'avis qu'il falloit achever ; mais quelqu'un plus modéré, si l'on peut dire qu'il y eût de la modération en cette rencontre, opina à la vie. Ainsi on les laissa vivre, mais on leur fit souffrir des peines extrêmes : on les mena jusqu'au

[1] Fléchier, p. 152. [2] Ibid., p. 153.

Palais tout nuds dans la plus grande rigueur de la saison ; on leur donna mille coups de fouets durant le chemin, et on les renvoya presque aussi morts comme leurs compagnons, avec défense de regarder derrière eux sous peine de la vie.'

I take another example of the feuds leading to crimes, and quote the account of the fight between le Baron de Blot and M. de Puy-Guilhaume.[1] A duel was to take place. But the two enemies met on the highway.

'M. de Puy-Guilhaume, soit qu'il fût mieux monté que les autres, soit qu'il fût bien aise d'être un peu plus avancé pour rêver à son affaire et pour entretenir son ressentiment, étoit éloigné d'eux de trente à quarante pas, et avoit déjà franchi la montée, lorsqu'il vit son ennemi qui venoit le chercher de ce côté-là, et qui n'était pas fort éloigné, courut à lui pistolet à la main. Il fit ses avances de son côté ; ainsi, ils se trouvèrent à une juste distance pour tirer leurs coups avant que de pouvoir en être empêchés. La rencontre fut si imprévue et le combat fut si subit, que ceux qui étoient venus pour assister leur ami le virent revenir sur ses pas, blessé qu'il étoit, et tomber bientôt de cheval, criant qu'il avait le ventre brûlé.'

He died next day.[2]

I take another example—the trial of le Comte d'Apchier. He was accused of having levied taxes, besieged houses, whipped bourgeois, and treated ladies shamelessly. He was at first condemned to be hanged, but, discovering his rank, the court ordered him to be beheaded.[3]

Here is the series of charges against another of the petty nobles, M. le Comte de Montvallat :[4] that he sold justice ; that if any one had committed murder the Comte promised him security on payment of a certain sum ; that if complaints were made of non-payment of debts the complaints were stifled on payment of a sum.

[1] Ibid., p. 193.
[2] Ibid., p. 195.
[3] Ibid., p. 297.
[4] Ibid., pp. 171–6.

'Il étoit encore chargé d'avoir tiré par force des obligations, d'avoir tenu long-temps dans un cachot et maltraité un paysan qui lui avoit fait, à ce qu'on dit, une fausseté, et de plusieurs autres chefs qu'on avoit accumulés,' &c.[1]

Here is another case, that of M. de Veyrac,[2] a petty noble, proud of his rank, who was offended at the idea of a notary going to law with him, and who resolved to take vengeance for this affront.

'Il assembla donc quelques-uns de ses amis et quelques traîneurs d'épées des villages voisins, et alla assiéger la maison de ce pauvre homme, qui, se voyant réduit à l'extrémité, résista de toutes ses forces, et se fortifia du mieux qu'il put, résolu à vendre chèrement sa vie. . . . Il se retrancha donc contre les assauts de l'assiégeant, et se défendit jusqu'à ce qu'on eut forcé la première porte. Il se réfugia dans une chambre, et résolut de faire briser toutes les portes de sa maison, avant que de se rendre.'

The besiegers promised him his life if he opened the door.

'Mais il reconnut bientôt la faute qu'il venoit de faire, et son ennemi aussi perfide qu'il étoit violent, ne se crut pas obligé de tenir la parole qu'il lui avoit donnée, et lui tira un coup de pistolet, donna ensuite sa maison au pillage.'[3]

Here is another typical criminal, M. de la Mothe-Tintry,[4] of whom Fléchier remarks:

'L'honneur qu'il avoit de porter l'épée, le titre de noble qui a été long-temps un titre d'impunité pour les criminels, sembla lui donner droit de faire quelques violences comme les autres, et n'ayant pas grand éclat de sa fortune, il crut ne pouvoir prouver sa noblesse que par quelque crime.'

He had ordered a peasant to give several days to reaping his meadows. The peasant refused.

'La Mothe l'ayant un jour trouvé endormi sous un arbre,

[1] Fléchier, p. 175.
[2] Ibid., pp. 221–2.
[3] Ibid., p. 220.
[4] Ibid., p. 235.

lui tira un coup de pistolet, et voyant qu'il ne l'avoit point tué, lui donna plusieurs coups d'épée et le réduisit à l'extrémité.'

He then fled from justice, but was captured.

Here is another example of the same sort of crime. A certain noble had seized an ecclesiastical benefice. M. Dufour wished to dispossess the usurper. Hence a quarrel. M. Dufour, travelling with an armed escort, was attacked by his enemy and an armed party. He was shot, and the murderers, to complete their work, gave him seven or eight sword thrusts.[1]

Perhaps the Baron de Sénégas is as good an example as any of the crimes which were committed by men who were a law unto themselves. He was charged with having raised and appropriated the taxes and tithes, with raising troops, &c.

'On le chargeoit d'avoir enlevé une bannière, d'avoir démoli une chapelle consacrée à la Vierge, et d'en avoir employé les matériaux aux fortifications d'une de ses maisons.'

He was charged with several murders. But the worst offence laid to his charge was that, having some grievance against some one who was 'justiciable' to him, he seized him

'et le renferma dans une armoire fort humide où il ne pouvoit se tenir debout ni assis, et où il recevoit un peu de nourriture pour rendre son tourment plus long; de sorte qu'ayant passé quelques mois dans un si terrible cachot, et ne respirant qu'un peu d'air corrompu, il fut réduit à l'extrémité; ce qui fit qu'on le retira demi-mort et tout à fait méconnoissable. Son visage n'avoit presque aucune forme, et ses habits étoient couverts d'une mousse que l'humidité et la corruption du lieu avoient attachée.'[2]

I might multiply the examples of such cases. And now a word as to the mode of trial. The special court

[1] Ibid., pp. 299–302. [2] Ibid., pp. 232–3.

was composed of sixteen judges (*conseillers*) of the Parliament of Paris, presided over by one of the Presidents of the Parliament. It had jurisdiction over all criminal offences and civil matters, but the former, it was expressly declared, were to be first determined.[1] The procedure was such as was then in use in a French court of justice, the procedure which existed before Colbert's reforms in 1670. It was an inquisitorial system, pursued in the name of the judge though instigated by the denunciation of the party injured or by the *ministère public*. The great aim of the instruction was to extort confessions or admissions.

'Pour cela, les moyens les plus odieux étaient employés : les interrogatoires captieux et répétés, le serment imposé à l'accusé de dire toute la vérité sur lui-même, la torture enfin, sous ses deux formes, question préparatoire contre les accusés pour leur arracher l'aveu du crime, question préalable contre les condamnés pour obtenir la révélation de leurs complices.'[2]

The procedure was secret. Each case on the list was referred to a reporter, whose report was based on statements made under oath. This report was generally decisive of the case. The prisoner and witnesses were interrogated on the 'sellette'.[3]

'Non seulement, dès le xvème siècle, le public avait été chassé des auditoires judiciaires, mais encore la plupart des actes étaient faits en présence d'un seul magistrat et son greffier, en dehors l'accusé, qui n'en avait pas connaissance et qui ne pouvait les contredire. Ils étaient constatés dans les pièces écrites, qui étaient communiquées au ministère public mais non à l'accusé. . . . Le procès criminel avait pris la forme d'une instruction préparatoire *secrète et écrite*, démesurément développée et conduite par un seul juge ; c'était presque uniquement sur les pièces écrites de cette instruction que le tribunal assemblé rendait la sentence ; il ne

[1] Fléchier, Introduction, p. xvi.
[2] Esmein, p. 784.
[3] Fléchier, pp. 77, 175.

voyait l'accusé qu'une fois, lors d'un dernier interrogatoire que celui-ci subissait devant lui.' [1]

It was also a highly technical procedure; non-observance of the slightest forms might be fatal to the best case.

'Celui qui prêtait serment devait mettre la main droite sur les reliques, passer le pouce sous la main, et prononcer la formule de serment sans bouger. Toutes les infractions à ces préceptes étaient attribuées à l'émotion éprouvée par celui qui allait prêter un faux serment.' [2]

The Avocat Général stated his 'conclusions', i.e. the sentence he desired inflicted. The punishments were severe: for the nobles, beheading and forfeiture of property; heavy fines, or banishment; in some cases the galleys, or demolition of the house of the offender.[3]

And now I come to what is a no less important aspect of the trials, what I may call the scenic or symbolic element in them. Many of the criminals fled the country; they were tried in their absence, found guilty, and condemned. Then took place strange scenes which I describe in Fléchier's words: [4]

'Il y avoit un si grand nombre de criminels qu'on en fit effigier un jour près de trente à la fois. Il faisoit beau voir dans la place des exécutions tant de tableaux exposés, dans chacun desquels un bourreau coupoit une tête. Ces exécutions non sanglantes, et ces honnêtes représentations qui n'on qu'un peu d'infamie, étoient un spectacle d'autant plus agréable, qu'il y avoit de la justice sans qu'il y eût de sang répandu. Ces tableaux restèrent un jour, et tout le peuple par curiosité vint voir cette foule de criminels en peinture, qui mouroient sans cesse et ne mouroient point; qui étoient prêts à recevoir le coup sans le craindre, et qui ne cesseront point d'être méchans en effet, tant qu'ils ne seront malheureux qu'en figure.'

[1] Esmein, p. 784.
[2] Guétat, p. 486.
[3] Fléchier, p. 222.
[4] Ibid., p. 285.

I mention this circumstance as one of the latest instances known to me of a characteristic of early criminal justice : a late survival of that which was once universal. Every step in procedure, certainly every step in criminal procedure, was scenic or symbolic, designed to convey a meaning or to impress the imagination. The dress of the judges, the accessories and furniture of the courts, the steps in the procedure, the oaths administered to the witnesses, the nature of the punishments inflicted in the affair, the formulae in use, all the incidents of a trial from the moment it began until it ended—sometimes by the judge breaking his wand of office—were intended to affect those who could not read or write. All that natural procedure had been infringed upon and destroyed by the substitution of a form of criminal justice conducted secretly and in writing by means of experts. The only part which remained public was the execution, and, in order to invest all the sentences with solemnity, even those which terminated in no bloodshed were scenically represented.

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